In the Supreme Court

Appeal from the Court of Appeals

O'Connell, P.J., and White and Smolenski, JJ.

_____/

THE TITLE OFFICE, INC.,
a Michigan Corporation,

Plaintiff-Appellee,

v

Docket No: 121177, 121178

FULTON J. SHEEN, Allegan County Treasurer
SANDRA THATCHER, Branch County Treasurer
GARY LEININGER, Hillsdale County Treasurer
NANCY HICKEY, Ionia County Treasurer
JANET ROCHEFORT, Jackson County Treasurer
HERMAN DRENTH, Kalamazoo County Treasurer
DIANNE H. HARDY, Livingston County Treasurer
KAREN MAKAY, Van Buren County Treasurer,

Court of Appeals Case No.
225377

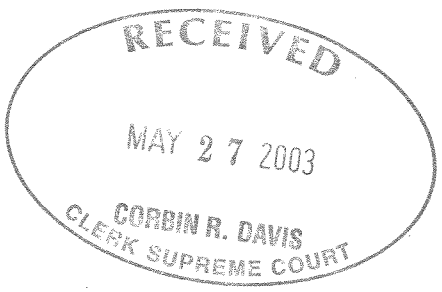
Circuit Court Case No.
99-017173-CZ

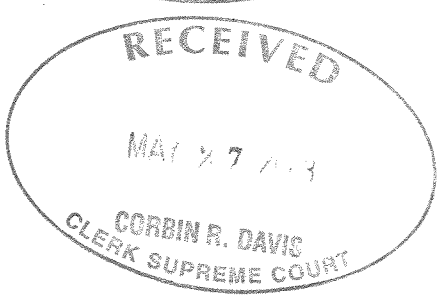
Defendants-Appellants.

_____/

BRIEF ON APPEAL – APPELLANTS

ORAL ARGUMENT REQUESTED





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STATEMENT OF JURISDICTION

This Court has jurisdiction of this case pursuant to MCR 7.301(A)(2) and MCR 7.302. Defendants/Appellants timely filed an appeal as of right in the Court of Appeals from the Livingston County Circuit Court's December 29, 1999 Opinion and January 31, 2000 Order Granting Plaintiff's Motion for Summary Disposition, pursuant to MCR 7.204, on February 18, 2000, which was within 21 days of the entry of the Circuit Court's January 31, 2000 Opinion and Order.

On January 18, 2002, the Court of Appeals issued its Opinion affirming the Circuit Court's Opinion and Order for the reason that it was so constrained by MCR 7.215(I)(1). On February 8, 2002, the Court of Appeals entered an Order declining to convene a special panel.

Defendants/Appellants timely filed this Delayed Application for Leave to Appeal, pursuant to MCR 7.302(C)(3), on March 15, 2002, which is within 56 days of the Court of Appeals' February 8, 2002 Order. See MCR 7.215(I)(1).

On April 2, 2003, this Court entered its Order granting leave to appeal. In granting leave, this Court specifically directed the parties to include among the issues to be briefed the meaning, at the time of enactment, of "transcript" in 1895 PA 161 as amended, MCL 48.101, and whether by use of "transcript of any paper or record on file" the Legislature originally intended the act to cover subsequently developed means of document reproduction.

STATEMENT OF QUESTION PRESENTED

I. WHETHER THE PREVIOUS COURT OF APPEALS DECISION UPON WHICH THE COURT OF APPEALS RELIED AS CONTROLLING AUTHORITY IS CLEARLY ERRONEOUS, WHERE THE COURT OF APPEALS HELD THAT THE FEES CHARGED BY A COUNTY TREASURER FOR ELECTRONIC COPIES OF TAX RECORDS REQUESTED UNDER FOIA DO NOT FALL WITHIN EITHER OF THE TWO EXCEPTIONS TO THE FOIA COST PROVISIONS, WHERE THE TRANSCRIPTS AND ABSTRACTS OF RECORDS ACT SPECIFICALLY AUTHORIZES THE SALE OF THE RECORDS, AND/OR SPECIFICALLY PROVIDES THE AMOUNT OF THE FEE FOR PROVIDING THE PUBLIC RECORDS.

Plaintiff-Appellee says, "No."

Defendants-Appellants say, "Yes."

The Court of Appeals said "Yes", but was bound by MCR 7.215 to follow previously published precedent.

The Circuit Court did not answer this question

STANDARD OF REVIEW

A motion for summary disposition under MCR 2.116(C)(10) is reviewed de novo on appeal to determine if the moving party is entitled to judgment as a matter of law. Maiden v Rozwood, 461 Mich 109, 118; 597 NW2d 817 (1999).

INTRODUCTION

This Brief is submitted on behalf of Defendants/Appellants Fulton J. Sheen, Allegan County Treasurer; Gary Leininger, Hillsdale County Treasurer; Nancy Hickey, Ionia County Treasurer; Janet Rochefort, Jackson County Treasurer; Herman Drenth, Kalamazoo County Treasurer; and Dianne H. Hardy, Livingston County Treasurer, upon the granting of Plaintiff/Appellee's Motion for Summary Disposition in an action brought under FOIA, and the affirmance of that Order by the Court of Appeals, which held that although the lower court's ruling was erroneous as a matter of law, the Court of Appeals was constrained by its previous erroneous decision in Oakland County Treasurer v The Title Office, Inc, 245 Mich App 196; 627 NW2d 317 (2001).

Plaintiff-Appellee filed a Complaint alleging a violation of the Freedom of Information Act ("FOIA"), MCL 15.234; MSA 4.1801(4), asserting that the fees to be charged for its request for electronic copies of delinquent property tax records fell under the fee provisions of FOIA, and not within the express exceptions to the FOIA fee provisions set forth in MCL 15.234(4); MSA 4.1801(4)(4), where the fees to be charged were otherwise specifically provided by an act or statute, i.e., the Transcripts and Abstracts of Records Act, MCL 48.101; MSA 5.711.

The issue in this case is not a denial of the documents sought, but, rather, is about the fee Defendants/Appellants and other County Treasurers may charge for producing electronic (computer) copies of delinquent tax records. Plaintiff/Appellee asserted that the general fee provisions of FOIA are controlling. The Livingston Circuit Court agreed. On appeal, although the Court of Appeals disagreed with Plaintiff/Appellee and the lower court, it affirmed the lower court's decision because the Court of Appeals previous decision in

Oakland Co Treasurer v The Title Office, Inc, 245 Mich App 196; 627 NW2d 317 (2001) was deemed to be controlling.

There can be no question that FOIA sets out a specific exception to its nominal fee provisions in MCL 15.234(4); MSA 4.1801(4)(4):

> (4) This section does not apply to public records prepared under an act or statute specifically authorizing the sale of those public records to the public, **or if the amount of the fee for providing a copy of the public record is otherwise specifically provided by an act or statute.**

As such, Defendants/Appellants maintain that 1895 PA 161, the Transcripts and Abstracts of Records Act, MCL 48.101; MSA 5.711, is the statute which authorizes the sale, or otherwise requires a specific fee for providing a copy of the public tax records by County Treasurers and is, therefore, controlling. Specifically, MCL 48.101; MSA 5.711 provides:

> **County treasurer's record, transcript fees; disposition**
>
> Sec. 1. (1) A county treasurer shall make upon request a transcript of any paper **or record on file** in the treasurer's office for the following fees: (emphasis added)
>
> (a) For an abstract of taxes on any description of land, 25 cents for each year covered by the abstract.
>
> (b) For an abstract with statement of name and residence of taxpayers, 25 cents per year for each description of land covered by the abstract.
>
> * * *
>
> (d) For 1 copy of any paper **or document** at the rate of 25 cents per 100 words.
>
> (e) For each certificate, 25 cents.
> (Emphasis supplied).

Because this Act **specifically** mandates the amount of the fee to be charged for providing a copy of a public tax record, Defendants/Appellants are required to charge that amount. Any request for tax records under this Act is necessarily exempt from the fee structure set forth under FOIA.

In its Motion for Summary Disposition, Plaintiff/Appellee claimed that the clear and mandatory provisions of the Transcripts and Abstracts of Records Act do not apply because The Title Office did not request a written 'transcript' of an 'abstract of taxes' on a parcel of property. Rather, Appellee claimed it requested computer tapes reflecting the Treasurers' property tax information. As such, Appellee argued that the requested information -- computer information -- does constitute a "record" under FOIA but **does not** constitute a transcript of a "record" or "document" under the Transcripts and Abstracts of Records Act.

The ultimate issue upon which this Court's resolution of this matter rests is simply one of form or substance. The Court of Appeals held in the Oakland County case that the form in which the copies are to be reproduced (i.e., paper copies versus electronic copies) controls the application of the fee provisions of the Transcripts and Abstracts of Records Act. Hence, entities who request paper copies of records must pay the fees set forth in the Transcripts and Abstracts of Records Act, while the fees for entities which request electronic (computer) copies of these same records are controlled by the fee provisions of FOIA.

Conversely, Defendants/Appellants assert that the form the reproduction takes is irrelevant. Rather, the applicability of the fee provisions of the Transcripts and Abstracts of Records Act is controlled by the substance of the records which are sought to be copied. Here, there is no question that the substance of the records that Plaintiff/Appellee requested be copied falls squarely within the Transcripts and Abstracts of Records Act and, as such, the fee provisions of that Act are controlling.

As set forth below, the Court of Appeals' holding in the Oakland County case makes a distinction which sets the appropriate fee based upon the form of the requested copy (i.e. electronic copy versus paper copy), rather than (as espoused by Defendants/Appellants) the substance of the record to be copied and is, therefore, simply not tenable in light of the statutory requirements of the Transcripts and Abstracts of Records Act, nor in light of controlling statutes or Michigan precedent. Rather, the Transcripts and Abstracts of Records Act, the Michigan Reproduction of Public Records Act, and Michigan precedent all make clear that the fees required to be charged in the Transcripts and Abstracts of Records Act are not limited by the form of the copy to only "paper records", as Appellee asserts, but are rather the fees to be charged for a copy, in any form, of those records.

STATEMENT OF FACTS

A. PLAINTIFF/APPELLEE'S FOIA REQUESTS AND DEFENDANTS/APPELLANTS' RESPONSES

On August 14, 1998, Appellee submitted FOIA requests to Appellants, requesting an electronic copy of the tapes or files that contain the 1995, 1996, and 1997 property tax records of the various Counties. (See FOIA Requests, Exhibit A). Each County responded in writing to the FOIA Requests, indicating that the cost for production of the records would

be the statutory rate of $.25 as set forth in the Transcripts and Abstracts of Records Act. (See FOIA Responses, Exhibit B).

B. APPELLANTS' DATABASES CONTAINING RECORDS REGARDING PROPERTY TAXES.

Each of the individual Defendant-Appellant Treasurers maintain databases pursuant to the Records Media Act, MCL 24.328; MSA 3.560 (228), et seq, and the Michigan Reproduction of Public Records Act, MCL 691.1111; MSA 5.4093(1), containing information regarding property taxes within the respective counties. Each system contains current and continuously updated tax information for each parcel number within the County. This information includes, but is not limited to, the legal description of the property; the property address; the current taxpayer name and address for tax billing purposes; the years of tax delinquency; and any split information history. Each request for property tax information is typically answered by means of a tax abstract printed from a computer.

C. FEES CHARGED TO INDIVIDUALS OR OTHER ENTITIES FOR THE VERY RECORDS REQUESTED BY PLAINTIFF-APPELLEE.

Individuals or other entities which request tax information are required to pay the fees under MCL 48.101; MSA 5.711 for each record requested. This fee is assessed whether or not the taxes on a particular parcel are or are not delinquent.

In addition, several County Treasurers provide direct on-line access to their tax information. However, this computerized information is not free. Rather, entities contract with such Counties, and are charged per parcel to access the information.

D. THE FOR-PROFIT ACTIVITIES FOR WHICH APPELLEE IS USING THE REQUESTED RECORDS.

Appellee seeks to use the records sought here purely for commercial gain. Appellee is an agent for underwriters which issue policies of title insurance and perform other services in connection with the issuance of these policies. To perform the services, Appellee obtains information, including property tax information from local units of government and counties. Appellee has started operating a Web site which offers certain information on the Internet, including property tax information. By offering this information over the Internet, Appellee is performing a commercial service, for which a fee is charged. Thus, Appellee seeks the delinquent tax information in electronic format so that the information may be directly placed on its Web site for ultimate sale to its customers.

E. LITIGATION IN THE CIRCUIT COURT

Appellee disagreed with Appellants' position on the appropriate cost provisions for its FOIA requests, and filed this action on October 20, 1998. In its Complaint, Appellee claimed that each of the Appellants had denied its request under FOIA, and sought an order directing the Treasurer of each County to provide a computer tape copy of the requested property tax records, and requiring each County to charge only the actual incremental costs of downloading the information onto computer tape.

Appellee filed a motion for summary disposition under MCR 2.116(C)(10) which the lower Court granted, stating that the Transcripts and Abstracts of Records Act does not specifically authorize the sale of public records and does not specifically designate the amount of the fee for providing a copy of the public records sought, and therefore the exemptions to the FOIA fee provisions did not apply. (See December 29, 1999 Opinion,

Appendix, p A-4, and the January 31, 2000 Order, Appendix, p A-7). Appellants filed an appeal to the Michigan Court of Appeals.

F. THE COURT OF APPEALS DECISION IN THE OAKLAND COUNTY CASE

On April 3, 2001, the Court of Appeals issued for publication its decision in Oakland Co Treasurer v The Title Office, Inc, 245 Mich App 196; 627 NW2d 317 (2001), holding that the fees charged for *electronic* copies of property tax information requested from a County Treasurer fall under the nominal fee provisions of the Freedom of Information Act (FOIA), MCL 15.234; MSA 4.1801(4), rather than the fee provisions otherwise specifically provided by the Transcripts and Abstracts of Records Act, MCL 48.101; MSA 5.711. In so holding, the Court of Appeals misapplied the clear import of the exception to FOIA fees, where the amount of the fee for providing a copy of the public record is otherwise specifically provided by an act or statute. MCL 15.234(4); MSA 4.1801(4)(4).

Although the Court of Appeals noted that MCL 48.101; MSA 5.711 specifies the fees to be charged for records on file with a county treasurer, it stated that this statute does not contain "explicit language" providing fees for *electronic* copies of delinquent tax records, and therefore the records must be provided using the FOIA nominal fee requirements.

The Court of Appeals based its decision, at least in part, on its perception of the Oakland Treasurer's "indecision" as to which particular subsection of MCL 48.101; MSA 5.711 applied to the request for delinquent tax records.

On information and belief, the Oakland County Treasurer did not seek a rehearing of the Court of Appeals decision, or otherwise make application for leave to appeal to the Supreme Court.

G. APPEALS FROM THE LIVINGSTON CIRCUIT COURT

On February 18, 2000, Defendants filed a timely Claim of Appeal to the Court of Appeals. On August 21, 2001, Plaintiff/Appellee filed its Motion to Affirm, arguing that the Court of Appeals' April 3, 2001 decision in Oakland County, supra, was controlling, and required a resolution in favor of Plaintiff/Appellee.

On September 7, 2001, the Court of Appeals denied Plaintiff/Appellee's Motion to Affirm. (See September 7, 2001 Order, Appendix, p A-9)

On January 18, 2002, following briefing and oral argument, the Court of Appeals issued its published Opinion, reported at 249 Mich App 805; 642 NW2d 705 (2002), in which it held that the Transcripts and Abstracts of Records Act governs the fee that County Treasurers must charge for the records that Plaintiff/Appellee requested, contrary to the holding in Oakland County, supra. However, notwithstanding its disagreement with the Oakland County decision, the Court of Appeals affirmed the Circuit Court's Opinion and Order finding for Plaintiff/Appellee, as it was procedurally bound to do pursuant to MCR 7.215(I)(1). (See January 18, 2002 Opinion, Appendix, p A-10)

Pursuant to MCR 7.215(I)(3), the Chief Judge of the Court of Appeals polled the judges to determine whether a special panel should be convened to rehear the case for the purpose of resolving the conflict between the panels.

On February 8, 2002, the Court of Appeals entered an Order in which it determined that a special panel should not be convened. 249 Mich App 805; 642 NW2d 705 (2002). (See February 8, 2002 Order, Appendix, p A-19)

Defendants/Appellants now submit this Delayed Application for Leave to Appeal from the Court of Appeals decision affirming the Livingston Circuit Court's grant of Plaintiff/Appellee's Motion for Summary Disposition.

H. OTHER PENDING CASES AND APPEALS INVOLVING THIS ISSUE.

Catherine McClary, the Washtenaw County Treasurer, filed a pre-emptive declaratory judgment action against The Title Office, Inc., in the Washtenaw County Circuit Court on issues identical to those in the Oakland County case. (Catherine McClary, Washtenaw County Treasurer v The Title Office, Inc. a Michigan Corporation, Case No. 99-10618-CZ).

On September 29, 1999, upon the hearing of Defendant Title Office's Motion for Summary Disposition in the Washtenaw Circuit Court, Judge David S. Swartz opined -- contrary to the trial court decisions in Oakland County and the Livingston County action now before this Court -- that the fees to be charged for the records requested by The Title Office, Inc. were, in fact, controlled by the cost provisions of the Transcripts and Abstracts of Records Act, and not the costs provisions of the FOIA.

In making this determination, Judge Swartz was fully apprised of the circuit court ruling in Oakland County, as well as the case law here relied upon by Appellee. However, following extensive briefing and oral argument, the Court in the Washtenaw County Action opined, in pertinent part:

> The obvious conclusion to be drawn from these opinions[1] is that courts do not favor avoidance of the fee provisions of FOIA. However, the legislature could have easily provided that the FOIA rate take precedence over the other

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[1]Grebner v Clinton Charter Twshp, 216 Mich App 736; 550 NW2d 265 (1996)

> rate provision statutes. Instead, via section 4, the legislature explicitly provided two exceptions to the application of the FOIA rate provisions. Therefore, the Court respectfully disagrees with the two circuit judges' interpretation of the plain language of the statutes.
>
> This case clearly falls under the second exception[2] "or where the amount of the fee for providing a copy of the public record is otherwise specifically provided."
>
> (See Transcript, Exhibit C, p 23)

Even so, given the pendency of the appeal from Oakland, Judge Swartz stayed the Washtenaw County Action until the Court of Appeals issued an opinion on the Oakland County appeal:

> The case is stayed and the status quo maintained between the parties until such time as the Court can consider the application of the opinion of the Court of Appeals in an identical case now pending before the Court.
>
> (See Transcript, Exhibit C, p 24).

On May 15, 2001, following the issuance of the Court of Appeals' decision in Oakland County, the Washtenaw County Circuit Court entered its Opinion and Order Granting Defendant's Motion for Summary Disposition and Denying Plaintiff's Motion for Summary Disposition. (Exhibit D) The Washtenaw Circuit Court Opinion noted that although the court had previously indicated its inclination to rule in favor of the County Treasurer, the holding in the Oakland County appeal "controls the disposition of the instant case".

On June 1, 2001, the Washtenaw Treasurer timely appealed as of right to the Court of Appeals (Case No. 234602), and on June 26, 2001 sought leave to appeal to the Supreme Court prior to the issuance of a decision by the Court of Appeals. The

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[2]MCL 15.234; MSA 4.1801(4)

Treasurer's application for bypass appeal was denied by the Supreme Court in an Order dated August 28, 2001 (Case No. 119546). The Title Office thereafter filed a Motion to Affirm in the Court of Appeals, which was granted by the Court of Appeals on December 7, 2001. On January 17, 2002, the Washtenaw Treasurer filed an Application for Delayed Appeal to the Supreme Court, which application (SC: 120801) is being held in abeyance pending the decision in the instant appeal.

In addition, Appellee made FOIA requests to numerous County Treasurers throughout Michigan for delinquent tax records, demanding that the fees charged be the nominal fees under FOIA, as opposed to the specific fees set forth in the Transcripts and Abstracts of Records Act.

For example, in The Title Office, Inc v Antrim County, et al, Ottawa County Circuit Court Case No. 99-34110-CZ, Appellee named as Defendants forty (40) counties and their County Treasurers. On January 12, 2000, the parties stipulated to an indefinite stay of proceedings, pending the Court of Appeals decision in the Oakland County case. The parties subsequently agreed to extend the stay of proceedings pending the outcome of the appeals from Livingston County and Washtenaw County.

ARGUMENT

I. THE COURT OF APPEALS DECISION UPON WHICH THE COURT OF APPEALS RELIED AS CONTROLLING AUTHORITY WAS CLEARLY ERRONEOUS IN HOLDING THAT THE FEES CHARGED BY COUNTY TREASURERS FOR ELECTRONIC COPIES OF DELINQUENT TAX RECORDS DO NOT FALL WITHIN EITHER OF THE TWO EXCEPTIONS TO THE FOIA COST PROVISIONS, WHERE THE TRANSCRIPTS AND ABSTRACTS OF RECORDS ACT SPECIFICALLY AUTHORIZES THE SALE OF THE RECORDS, AND/OR SPECIFICALLY PROVIDES THE AMOUNT OF THE FEE FOR PROVIDING THE PUBLIC RECORDS

A. FOIA, ITS FEE STRUCTURE, AND THE SPECIFIC EXEMPTION FROM THE FOIA FEE STRUCTURE FOR RECORDS FOR WHICH A FEE IS PROVIDED BY A DIFFERENT ACT

The general FOIA rule, with exemptions, provides that a public body is limited to charging the actual cost for searching and reproducing a document when responding to a FOIA request. This general rule specifically sets forth a procedure to determine the cost for a public record search and provides exemptions to the general rule. The statute, at the time Appellee made its FOIA request, provided in relevant part:

> Fees; waiver; deposit; computation of costs; review by bipartisan joint committee
>
> Sec 4 (1) A public body may charge a fee for. . . providing a copy of a public record.
>
> * * *
>
> (4) This section does **not** apply to public records prepared under an act or statute specifically authorizing the sale of those public records to the public, **or if the amount of the fee for providing a copy of the public record is otherwise specifically provided by an act or statute.**

MCL 15.234; MSA 4.1801(4) (emphasis added).

Thus, as is clear from a reading of the above provision, the FOIA fee structure **does not apply in the circumstance where an act or a statute sets forth a specific fee to be charged for providing a copy of the public records.** Under such circumstance, the more specific act or statute controls the fee to be charged for the public record.

Simply put, Appellee's position (and that of the Court of Appeals in the Oakland County case) that the general provisions of FOIA are controlling ignores the Legislature's inclusion of a specific FOIA cost exemption which makes clear that where, as here, a

different statute provides a fee for a copy of a public record the FOIA cost provisions DO NOT apply. As set forth below, and notwithstanding the Court of Appeals' erroneous decision to the contrary, the Transcripts and Abstracts of Records Act does specifically set forth a fee for the tax records requested by The Title Office, Inc. and, as such, it is the fee provisions of the Transcripts and Abstracts of Records Act which control.

B. THE CONTROLLING TRANSCRIPTS AND ABSTRACTS OF RECORDS ACT

Under the Transcripts and Abstracts of Records Act, MCL 48.101; MSA 5.711, the County Treasurer is specifically mandated by the Michigan legislature to charge a statutorily determined fee for public record searches relating to property tax. The Act provides in relevant part:

> **County treasurer's record, transcript fees; disposition**
>
> Sec. 1. (1) A county treasurer shall make upon request a transcript of any paper **or record on file** in the treasurer's office for the following fees: (emphasis added)
>
> (a) For an abstract of taxes on any description of land, 25 cents for each year covered by the abstract.
>
> (b) For an abstract with statement of name and residence of taxpayers, 25 cents per year for each description of land covered by the abstract.
>
> * * *
>
> (d) For 1 copy of any paper **or document** at the rate of 25 cents per 100 words.
>
> (e) For each certificate, 25 cents

Because this Act **specifically** mandates the precise fee that is required to be charged for providing a copy of a public tax record, Appellants were obliged to charge that amount for

Appellee's request. Any request for tax information under this Act is consequently exempt from the fee structure set forth under FOIA.

C. DEFENDANTS/APPELLANTS MUST CHARGE THE STATUTORILY MANDATED FEE FOR THE PRODUCTION OF PROPERTY TAX RECORDS

Appellee contends that Appellants violated FOIA because they intend to charge Appellee the statutory fee of $.25 for the requested property tax records, as required by the Transcripts and Abstracts of Records Act. Specifically, Appellee argues that since it requested a "computer tape" and not "paper copies" of the property tax records, the FOIA exemption does not apply. Appellee's argument is one of form over substance and is wholly without merit. The Court of Appeals decision in the Oakland County case similarly exalts form over substance, by making a distinction where the records are requested in electronic format.

1. FOIA Exemption

To be exempt from the FOIA fee structure set forth in MCL 15.234(4); MSA 4.1801(4)(4), another act or statute must specifically authorize the sale of the record or specifically provide the amount to be charged for the public record. As noted previously, the County Treasurer **must** charge at least $.25 for the property tax records.

In Grebner v Clinton Charter Twp, 216 Mich App 736; 550 NW2d 265 (1996), the Court of Appeals considered the circumstances under which the FOIA exemption applied. The Court concluded that the exemption was a narrow one and turned on the word "specifically." Id., at 742. The Court explained that "specific," as defined in Random House Webster's College Dictionary, was synonymous with the word "explicit." Id., at 743. Thus,

in terms of the portion of the FOIA exemption "specifically authorizing the sale of those public records," the act or statute must explicitly authorize the sale of the record to fall under the exemption. At issue in Grebner was the Michigan Election Law, MCL 168.522(1); MSA 6.1522(1). The Court compared that statute to two other statutes which specifically authorized the sale of public records, the Michigan Register statute, MCL 24.259(2); MSA 3.560(159)(2), and the Legislative Council Act, MCL 4.1204(3); MSA 2.138(204)(3). In relevant part, the Michigan Register statute provides:

> [T]he department of management and budget shall hold . . . for sale at a price not less than the publication and distribution costs . . .

MCL 24.259(2); MSA 3.560(159)(2).

In relevant part, the Legislative Council Act provides:

> The money received from the sale of access and related services . . . along with fees charged for training and the sale of user manuals . . .

MCL 4.1204(3); MSA 2.138(204)(3). The Court of Appeals found that the above two quoted statutes "*specifically*, that is explicitly, authorize sales." Id.

The Court analyzed the statutes and found that although the above two statutes specifically authorized the sale of the public records, the Michigan Election Law provided "only for the payment of costs of preparing copies of voter registration records, as opposed to their sale." Id. Since the Election Law Statute was not an explicit authorization of the "sale" of the voter registration rolls, it did not fit within the FOIA exemption, and the plaintiff needed only to pay the fee required under FOIA.

The above analysis in Grebner is instructive to the instant case. The FOIA exemption provides:

(4) This section does not apply to public records prepared under an act or statute specifically authorizing the sale of those public records to the public, **or where the amount of the fee for providing a copy of the public record is otherwise specifically provided by an act or statute.**

MCL 15.234(4); MSA 4.1801(4).

The Transcripts and Abstracts of Records Act, MCL 48.101; MSA 5.711, is a mandatory statute which clearly falls within the FOIA exemption. Contrary to Appellee's contention that the statute "merely permits" the County Treasurers to charge a fee for a transcript of an abstract of taxes, the word "shall" in the statute clearly establishes that the Legislature has specifically mandated County Treasurers to charge a specific fee for requests for property tax records:

> Sec. 1. (1) A county treasurer **shall** make upon request a transcript of any paper or record on file in the treasurer's office for the following fees:
>
> (a) For an **abstract of taxes on any description of land**, 25 cents for each year covered by the abstract.
>
> (b) For an **abstract with statement of name and residence of taxpayers**, 25 cents per year for each description of land covered by the abstract.

The statute specifically requires a County Treasurer to charge $.25 for the information which comprises the property tax records. Like the Michigan Register Statute and the Legislative Council Act examined in Grebner, the Transcripts and Abstracts of Records statute "*specifically*, that is explicitly" sets the precise amount of fee to be charged for the property tax records requested by Appellee. Grebner, 216 Mich App at 743.

D. THE COURT OF APPEALS DECISION AVOIDS THE FEE PROVISIONS OF THE TRANSCRIPTS AND ABSTRACTS OF RECORDS ACT BY LIMITING THE DEFINITION OF "TRANSCRIPT" TO PAPER COPIES OF RECORDS; IGNORES THE FULL DEFINITION OF "TRANSCRIPT" IN USE WHEN THE TRANSCRIPTS AND ABSTRACTS STATUTE WAS PASSED INTO LAW; WOULD UNDULY RESTRICT THE PURPOSE OF THE STATUTE GIVEN THE ADVANCES IN TECHNOLOGY; IGNORES THE STATUTORY REQUIREMENTS THAT COMPUTERIZED COPIES OF RECORDS HAVE THE SAME FORCE AND EFFECT AS THE ORIGINAL "PAPER" RECORDS; AND WOULD RESULT IN DISSIMILAR FEES BEING CHARGED THE PUBLIC FOR THE SAME RECORDS BASED UPON THE FORM OF THE COPY WHICH WOULD RESULT IN PREFERENTIAL TREATMENT BEING GIVEN TO ONLY THOSE ENTITIES WITH ACCESS AND KNOWLEDGE OF COMPUTERS.

Both in Appellee's Motion for Summary Disposition in the trial court, as well as the Court of Appeals' decision in the Oakland County case, the "form" over "substance" position is that the clear and mandatory provisions of the Transcripts and Abstracts of Records Act do not apply, because The Title Office did not request a paper copy of an "abstract of taxes" on a parcel of property. Rather, Defendant/Appellee requested computer tapes with the electronic data to derive the Treasurers' property tax information. As such, Appellee argues that the requested computer information does constitute a "record" under FOIA, but **does not** constitute a transcript of a "record" or "document" under the Transcripts and Abstracts of Records Act, because the form of the copies are electronic copies rather than paper copies.

Neither Appellee nor the Court of Appeals has cited any legal basis for such form over substance position, or for such a restrictive definition of "transcript". Simply stated, the "form" argument is without merit, as clearly set forth in the Court of Appeals January 18, 2002 Opinion in the instant appeal.

In its Order granting leave to appeal, this Court directed the parties to include among the issues to be briefed the meaning, at the time of enactment, of "transcript" in 1895 PA 161 as amended, MCL 48.101, and whether by use of "transcript of any paper or record on file" the Legislature originally intended the act to cover subsequently developed means of document reproduction.

1. Definition of "Transcript"

At the time of enactment of the Transcripts and Abstracts of Records Act in 1895, the term "transcript" was defined in Webster's International Dictionary (1890). as:

> 1. That which has been transcribed: a writing or composition consisting of the same words as the original; a written copy.
> 2. A **copy of any kind**; an imitation.

The term "transcript" was defined in Abbott, Dictionary of Terms and Phrases Used in American or English Jurisprudence (1879) as:

> "A copy; anything written from an original. Burrill says it means a copy, particularly of a record. This has always been the import of the word, it rarely or never being applied to copies of other writings."

Webster's New International Dictionary (1921), based on the International Dictionary of 1890 and 1900, defined "transcript" as:

> 1. That which has been transcribed; a written copy.
> 2. Hence, a copy **of any kind**; an imitation.
> Syn. – See Duplicate.

Contemporaneous case law supports the notion that a transcript is a copy of a record. In Waiteman v Bowles, 58 SW 686 (Ind. Terr., 1900), the Court interpreted a statute providing that a justice shall file a "transcript of all the entries made in his docket relating to the cause." The Court stated at 690:

> What is a transcript? A transcript is defined by Webster: "First. A copy; a writing made from and according to an original; a writing or composition consisting of the same words with the original. **Second. A copy of any kind.**" Mr. Anderson, in his Law Dictionary, defines a transcript to be: "First. A copy of an original record. Second. To copy, or to copy officially. Whence transcripted." Mr. Bouvier defines a transcript to be a copy of an original writing or deed.

The word "transcript," not only in its popular but legal sense, means "a copy of something already reduced to writing." State v Board of Equalization of Washoe County, 7 Nev 83, 95 (1871).[3]

Based upon the foregoing usage of the term "transcript" at the time of the enactment of 1895 PA 161, it is clear that the Legislature intended the word "transcript" to mean a copy of an official record on file with the County Treasurer, i.e., a duplicate of the actual record, whereas an "abstract" was the summary statement of the contents of an official record, but not an exact copy of the record.

Here, there can be no question that the electronic copies of the County Treasurers' official property tax records are exact copies of the records which could also be reproduced in paper form under the fee provisions of the Transcripts and Abstracts of Records Act.

Appellees' reliance on the definition which include the definition of a "transcript" to encompass "a copy of any kind" and, thus to include other non-paper or non-written copies

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[3]An "abstract," on the other hand, is a statement of the substantial contents of a record, and differs from a transcript, in that the latter is a copy of the record. Harrison v Southern Porcelain Mfg Co, 10 SC 278, 283 (1878). See Black's Law Dictionary (1891). In Anderson's Dictionary of Law (1889), the term "abstract" is defined as:

> That which is drawn off: an epitome, a summary. Referring to records, ordinarily a brief, not a copy, of that from which it is taken.

However, the term "abstract" has also been used in the sense of "copy." Wilhite v Barr, 67 Mo 284, 286 (1879).

is well established by more recent precedent. For example, the appellate procedures under the Federal Labor-Management and Employee Relations Act, 5 USCA §§ 7701 et seq., requires the Merit Systems Protection Board to maintain a "transcript" of any hearing:

> An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right--
> (1) to a hearing **for which a transcript will be kept**; and...

However, the Merit Systems Protection Board does not normally maintain written or paper transcripts but, rather, "transcripts" of proceedings are maintained in a non-written and non-paper format (audio tapes). At least two cases arising under 5 USC §§ 7701 et seq. have addressed challenges by individuals who asserted that the failure to maintain transcripts in written or paper form violate the express "transcript" requirements of 5 USC §§ 7701 et seq. Notably, both cases have relied on the definition of a transcript to mean "copy **of any kind**," and thus to encompass not only written paper copies of records (as is Appellants' position here) but, rather, includes non-written and non-paper methods of maintaining and producing a "transcript". Specifically,

> Petitioner next objects to the fact that the board, in deciding to decline review, did not have a written transcript of the hearing conducted before its presiding official. It is argued that had such a transcript been available the board might have granted review. It is further contended that the board thus violated 5 U.S.C. §§ 7701(a)(1), which provides an employee subject to an adverse personnel action with the right "to a hearing for which a transcript will be kept."...
> The tape, of course, is available to the board at all times. Does this satisfy the statute in this case? The answer depends on whether an agency regulation reasonably interprets the legislative intent behind the statute. **The legislative history of the Reform Act contains no comment on the transcript requirement. Although commonly thought of as a writing, the**

> **primary definition of a transcript is "a copy of any kind." Black's Law Dictionary 1342 (5th ed. 1979). Thus, we believe that the board's keeping of a tape recording satisfies the section 7701(a)(1) requirement...**

Gonzales v Defense Logistics Agency, 772 F2d 887, 890 (Fed Cir, 1985) (emphasis supplied, citations omitted).

To like effect, in Gearan v Department of Health and Human Services, 838 F2d 1190 (Fed Cir, 1988) the Federal Circuit Court of Appeals addressed the sufficiency of the Merit Systems Protection Board's maintaining as a "transcript" non-paper and non-written audio tapes and, further, whether those non-written "transcripts" were adequate as part of the record on appeal. Again citing with authority the Gonzales conclusion that:

> Although commonly thought of as a writing, the primary definition of a transcript is "a copy of any kind." Black's Law Dictionary 1342 (5th ed 1979). Thus, we believe that the board's keeping of a tape recording satisfies the section 7701(a)(1) requirement and that petitioner's speculation that he was prejudiced is without merit.

The Court in Gearan concluded:

> **Thus, for purposes of 5 U.S.C. §§ 7701, a tape recording satisfies the transcript requirement**....
> In the event that the court orders transmission of the record, it is the usual practice for the MSPB to produce the record as it is maintained by the MSPB, i.e., written transcript, if prepared, or hearing tape.

Gearan, 838 F2d at 1191 (emphasis supplied). Other courts have similarly relied on the definition of "transcript" as including a "copy of any kind" in order to include non-written/non-paper video transcripts. See, e.g., Ronald G. Connolly, MD, PA v Russell J Labowitz, MD, PA,1987 WL 28316 n 1) (Del Super, Dec 15, 1987)(Unpublished opinion, Exhibit D).

Thus, under the parlance of the time in which MCL 48.101 was first enacted, as well as the current definition of the term, a "transcript" in the Transcripts and Abstracts of Records Act encompasses a "copy of any kind". Here, it is without question the electronic copies of the County Treasurers' official property tax records are exact copies of the records which could also be reproduced in paper form under the fee provisions of the Transcripts and Abstracts of Records Act.

2. Legislative Intent to Cover Subsequent Technologies

Appellee has also argued, and the Court of Appeals has so held in the Oakland County case, that since the Transcripts and Abstracts of Records Act was first passed in 1895, a "transcript" could not be intended to be an electronic copy. Appellants grant that the Legislature in 1895 could not have perceived the sweeping technological changes that would occur during the 20th century. Even when the Act was amended in 1974, electronic copies were simply not contemplated. However, by 1974, the Legislature clearly was aware that technological changes had occurred which made the 1895 practice of copying abstracts by hand (i.e., mimeograph machines, carbon paper and photocopying[4]) obsolete and unnecessary. However, contrary to the position of Appellants here, notwithstanding that the "form" of making "transcripts" had changed since 1895 due to changes in technology, fees charged for transcripts were nonetheless continued (and increased), notwithstanding technological advances which dramatically altered the mechanism by which such transcripts were produced, and the form of such reproduction.

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[4] Photocopying became commercially available in 1950.

As such, there is no question that the Legislature intended that a mere change in the mechanism or form of the copy is unimportant; rather, the question is one of substance, i.e., whether an exact copy of an official public record was made. To find otherwise would ignore the advances of the last century which altered the mechanics of copies (hand copy/mimeograph copy/carbon paper/photocopy/computer copy), and would ill suit the law to adapt to the changing technologies of the future.[5]

In enacting 1895 PA 161, the Legislature intended the phrase "transcript of any paper or record on file" to encompass subsequently developed means of document reproduction. Although the statute does not specify in what manner a transcript, i.e., copy of an official record, was to be reproduced, the Legislature left open the means of making copies, such that technological improvements in copying would be encompassed. This is because the statute was primarily concerned with fixing the fees to be charged for the records furnished by the Treasurers.

Legislation is often written in terms which are broad enough to cover many situations which could not occur to mind at the time when it is enacted. 2A Sutherland, Statutes and Statutory Construction (4th Ed.), §49.02, citing Unexcelled Chemical Corp v United States, 345 US 59; 73 S Ct 580; 97 L Ed 821 (1953) and Trcyzniewski v City of Milwaukee, 15 Wis2d 236; 112 NW2d 725 (1961).

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[5]For example, State agencies, as well as county government, are authorized under law to conduct certain quasi-judicial hearings. See, for example, MCL. 330.1145; MSA 14.800(145) (Mental Health Code). The record of these hearings is commonly generated, and maintained by computer. The law provides that costs of "transcripts" of the hearings will be paid by a party requesting the transcript. Id. However, by accepting Appellee's position here, the cost of the transcript would be limited to FOIA costs if the record is requested in computer format, as opposed to the stenographer's charge if a written document is requested.

And so a statute, expressed in general terms and words of present or future tense, will be applied, not only to situations existing and known at the time of the enactment, but also prospectively to things and conditions that come into existence thereafter. 2A Sutherland, supra, citing Lakehead Pipe Line Co, Inc v Dehn, 340 Mich 25; 64 NW2d 903 (1954). As declared by the Tenth Circuit Court of Appeals:

> It is a general rule in the construction of statutes that legislative enactments in general and comprehensive terms, and prospective in operation, apply to persons, subjects and businesses within their general purview and scope, though coming into existence after their passage, where the language fairly includes them.

Cain v Bowlby, 114 F2d 519 (10th Cir, 1940). This rule of statutory construction has also been applied to changes in technology which occur after the passage of a statute:

> It may well be that the Legislature did not have in mind the precise arrangement here involved. We gather that the reversible pump- turbine, which is the key to the arrangement, was developed after the enactment of the statute. Yet we ought not assume the Legislature intended its grant of power to be limited by the existing state of technology and thus to deny municipalities the opportunity to profit from developments.

Whelan v New Jersey Power & Light Co, 45 NJ 237; 212 A2d 136 (NJ, 1965). See, to like effect, Mid-Louisiana Gas Co v Sanchez, 280 So 2d 406 (La App 4 Cir., 1973):

> We cannot accept the restricted and limited meaning of the statutes, as suggested by the defendants (that expropriation is available only for Pipeline use), to defeat a meaning consistent with the development of technology in a progressive era. Statutory construction cannot be so interpreted.

There have been numerous other applications of this principle. For example, in order to enable the United States Constitution to continue to be relevant to changing economic and social conditions it was said that:

> It is upon this theory of progressive construction that the powers conferred upon congress to regulate commerce, and to establish post-offices and post-roads, have been held not confined to the instrumentalities of commerce, or of the postal service known when the constitution was adopted, but keep pace with the progress and developments of the country, and adapt themselves to the new discoveries and inventions which have been brought into requisition since the constitution was adopted, and hence include carriage by steamboats and railways, and the transmission of communications by telegraph.

Wisconsin Tel Co v Oshkosh, 62 Wis 32; 21 NW 828, 830-831 (1884)(emphasis added).

In modern times the rule has received frequent application in connection with situations where the automobile had been included within general statutes applying to stage coaches, carriages and the like and which were enacted before the time of the automobile. Likewise radio performances have been held to come within the meaning of copyright laws, talking pictures have been held to come within the terms of statutes applying to films, and telephones have been recognized as included within statutes applying to the telegraph, although such inventions were unknown at the time such laws were enacted. See Cain, supra, at 522, and cases cited therein; 2A Sutherland, supra, §49.02, footnotes omitted.

In Lakehead Pipe Line Co, supra, this Court stated at 34:

> This Court has repeatedly recognized and declared the principles to be observed in the interpretation of a legislative enactment. A statute must be construed in the light of the purpose sought to be accomplished thereby. *Geraldine* v. *Miller*, 322 Mich 85, 96. Quite frequently light is thrown on such purpose by recourse to the situation obtaining at the time of enactment, viewed from the standpoint of possible, or probable, future developments in a given field.

In Browder v United States, 312 US 335, 339; 61 S Ct 599 ; 85 L Ed 862 (1941), the U.S. Supreme Court noted:

> Old laws apply to changed situations. The reach of the act is not sustained or opposed by the fact that it is sought to bring new situations under its terms.

(Footnotes omitted.)

The Court in Browder cited Cain v Bowlby, supra, in which the Tenth Circuit held that a New Mexico statute originally enacted in 1882 relating to damages for wrongful death from injury occasioned by the negligence of a driver of any stagecoach or "other public conveyance," was applicable to a truck engaged as a common carrier of freight.

More recently, the Michigan Court of Appeals held that the phrase "other depository" as used in MCL 750.116; MSA 28.311, making it an offense to knowingly have in one's possession specified items adapted for use in breaking into any building, room, vault, safe or other depository, includes the trunk of a motor vehicle, notwithstanding that the language "any building, room, vault, or safe or other depository" was added to the former act in 1867, long before the invention of the motor vehicle. People v Smith, 36 Mich App 180; 193 NW2d 397 (1971).

The legal principles set forth above demonstrate that courts are to presume that the Legislature, in using the phrase "transcript of any paper or record on file" intended to include subsequent technological advances in the making, storing, and reproduction of

records. The use of the phrase "paper or record," clearly denotes the intention that a record may be in a form other than paper, yet still be a record, for which a transcript, i.e., duplicate or copy, could be furnished upon request for a fixed fee.

Further, the statute has been amended seven times since its enactment, most recently in 1974 and 1984. The Legislature did not attempt to specify or clarify whether a transcript of a paper or record on file was required to be handwritten, typewritten, photographed, photocopied, or reproducible on a computer tape or disk. There was no need to amend 1895 PA 161 to add unnecessary detail as to what constituted a copy of a record, notwithstanding that there had been several technological inventions and copy-making innovations in the intervening years. Rather, the general rule of statutory construction allowed for computer tapes and/or electronic copies to constitute a transcript, because the language fairly included copying of records by any technique, even those coming into existence after passage of the statute.

3. Maintenance of Records in Computer Format

Buttressing Defendants/Appellants' argument that it is the substance of the official document, rather than the form in which it is copied, which should control: all County Treasurers are statutorily authorized to maintain the records at issue in electronic form. They are authorized by two sources of authority to maintain the here-requested in records in computer files pursuant to the Records Media Act, MCL 24.403, et seq; MSA 3.560(421), and the Reproduction of Public Records Act, MCL 691.1111; MSA 5.4093(1). In fact,

copies of the here-requested records are not only permitted to be maintained in electronic form, but copies of the documents may be made in electronic form. MCL 691.1111; MSA 5.4093(1). The printed record is actually derived from the data stored in a computer.

The Reproduction of Public Records Act states that a county officer may maintain public records as permitted under the Records Media Act, i.e., in electronic files. MCL 691.1111; MSA 5.4093(1). In fact, copies of the records requested by Defendant/Appellee are not only permitted to be maintained in electronic form, but copies of the documents are specifically authorized to be made in electronic form. MCL 691.1111; MSA 5.4093(1). However, as here relevant, the Reproduction of Public Records Act mandates that the reproduction -- including computer reproduction -- HAS THE SAME FORCE AND EFFECT AS THE ORIGINAL PAPER RECORD. MCL 691.1103; MSA 3.993(3)(emphasis added). Specifically, MCL 691.1103 provides that:

> A reproduction of a record in a medium pursuant to the records media act . . . **has the same force and effect as the original**...

(Emphasis added). The position of Appellee here, and the Court of Appeals in the Oakland County case, that a "paper record" is different from a record reproduced on or by a computer is undercut by the fact that, by law, the electronic record has the same force and effect as the original and, as such, should be treated the same under the fee provisions of the Transcripts and Abstracts of Records Act.

This conclusion is further buttressed throughout the law of this State. Electronically stored data is specifically accepted as a writing. For example, FOIA itself considers computer files to fall within the definition of a "writing." MCL 15.232(h); MSA 4.1801(2)(h). FOIA defines "writing" as:

> . . . handwriting, typewriting, printing, photostating, photographing, photocopying, and every other means of recording, and includes letters, words, pictures, sounds, or symbols, or combinations thereof, and papers, maps, magnetic or paper tapes, photographic films or prints, microfilm, microfiche, magnetic or punched cards, discs, drums, or other means of recording or retaining meaningful content.

To like effect, "documents" subject to production under both the Michigan Court Rules and Federal Rules of Civil Procedure are also defined to include electronic data compilations. See MCR 2.310 and Fed R. Civ. P. 34. As noted in the commentary to Fed. R. Civ. P. 34, the definition of "documents" was revised:

> . . . to accord with changing technology. It makes clear that Rule 34 applies to electronics data compilations from which information can be obtained only with the use of detection devices . . .

Finally, Appellee's and the Court of Appeals' "form" assertion that the fee provisions of FOIA are the exclusive fee provisions applicable to any public record reproduced in a computerized format, and that fee provisions specifically provided for in other statutes would only apply to paper records, has no basis in the law. The fallacy of this argument is demonstrated by the Legislature's treatment of the Enhanced Access to Public Records Act, MCL 15.441; MSA 4.1083(1). That Act, which applies exclusively to public records in the form of electronic computer records, sets forth the same FOIA exemption language insofar as the fee which may be imposed. If, as held by the Court of Appeals, the "form"

of the requested copy would mandate that FOIA cost provisions control, rather than the substance of the official public documents to be copied controlling the fee to be paid, then there would be no rationale for the inclusion of the FOIA exemption language in the Enhanced Access to Public Records Act (which, again, applies exclusively to public records in the form of electronic computer records).

Finally, determining fees based upon the "form" of the copy, rather than the "substance" of the record would result in dissimilar fees being charged the public for the SAME records, and preferential treatment being given to those wealthy or technologically sophisticated individuals with access to and knowledge of computers.

E. STATUTORY CONSTRUCTION

1. The Court of Appeals' construction of the FOIA statute would require the nullification of other specific statutory provisions.

A basic tenet of statutory interpretation is to construe the statute so as to give full force and effect to all legislation if possible. In Speaker v State Administrative Bd, 441 Mich 547; 495 NW2d 539 (1993), the Court stated:

> When two statutes address the same subject, courts must endeavor to read them harmoniously and to give both statutes a reasonable effect. *Endykiewicz* v *State Hwy Comm*, 414 Mich 377, 385; 324 NW2d 755 (1982). As this Court explained in *Rathbun*:
>
> 'The legal presumption is that the legislature did not intend to keep really contradictory enactments in the statute books, or to effect so important a measure as the repeal of a law without expressing an intention to do so. An interpretation leading to such a result should not be adopted unless it is inevitable.' [284 Mich 544. Citation omitted.]

The Court of Appeals decision in Oakland County, which was deemed controlling in this case, would nullify the specific statutory exemption under MCL 15.234(4); MSA 4.1801(4)(4) for public records prepared under an act or statute specifically authorizing the sale of those records or the amount or fee for providing those records, where the request is for an electronic copy of a public record. Further, the Oakland County decision would effectively nullify the Transcripts and Abstracts of Records Act. The courts should not interpret legislation in a way that would negate other statutory provisions unless no other interpretation is possible.

On the other hand, Appellants' position (as initially agreed with by the Court of Appeals panel) gives full force and effect to all the provisions of both statutes. Appellants recognize the general fee provision under FOIA, but further recognize that MCL 15.234(4); MSA 4.1801(4)(4) provides a specific exemption from the fees that may be charged if another statute or act authorized the sale of a public record or the **amount of the fee for providing a copy of the public record**. Appellants' position gives full force and effect to the Transcripts and Abstracts of Records Act as a specific statute authorizing the charging of a fee for the sale of public records or the amount of the fee for providing a copy of the public record. FOIA not only did not intend to implicitly overrule this prior legislation, but section 4 was intended to continue the full force and effect of this prior legislation.

If this Court accepts the position that the language in the Transcripts and Abstracts of Records Act is not specific enough, there is virtually no legislation that would be specific enough to warrant the exemption under FOIA. Clearly that was not the intent of the

Legislature. If the Legislature wanted the charge for the production of all public records to be that under FOIA, it would have so stated. The FOIA clearly does not so provide, and, in fact, provides for specific exceptions.

2. Another tenet of statutory construction requires that when a conflict results from the existence of a specific statute and a general statute, the specific statute will prevail.

> The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. The Legislature is presumed to be familiar with rules of statutory construction. When promulgating new laws, it is charged with knowledge of existing laws on the same subject and presumed to have considered their effect on any new legislation. However, where two statutes conflict, and one is specific to the subject matter while the other is only generally applicable, the specific statute prevails. This is true even where the specific statute was enacted before the general one. (Citations omitted)

State Treasurer v Gardner, 222 Mich App 62, 67-68; 564 NW2d 51 (1997), rev'd on other grounds, 459 Mich 1 (1999).

The determination of which statutory provision applies in a given action when there are competing provisions is a purely legal question to be resolved by statutory interpretation. Yaldo v North Pointe Ins Co, 217 Mich App 617, 619; 552 NW2d 657 (1996), aff'd 457 Mich 341 (1999).

The Transcripts and Abstracts of Records Act was created in 1895 as "an act to require county treasurers to furnish transcripts and abstracts of records, and **fixing the fees to be paid** therefor." 1895 PA 161 (emphasis added). FOIA, on the other hand, was enacted in 1976. As the Transcripts and Abstracts of Records statute was created long before FOIA, the Legislature is presumed to know in 1976 that this 1895 specific statute

existed which required the County Treasurer to charge "the fees to be paid therefor" when a request was made property tax information. Moreover, FOIA is a general statute, while the Transcripts and Abstracts of Records Act specifically applies to property tax records and the specific fee the County Treasurer must charge the public to produce that information. If the Legislature had intended FOIA to override the County Treasurers $.25 fee for the property tax records, it would have so legislated. Specifically, if the intent was for the property tax records to be distributed without charge or at the nominal fee provided under the FOIA fee structure, the Legislature would not have created an exemption to the FOIA fee structure.

Similarly, the Legislature could have repealed the Transcripts and Abstracts of Records Act if it intended for the FOIA fee structure to apply to tax records. The fact that the Act was not repealed must be construed to mean that the Legislature did not intend FOIA to apply to tax records. Alpena Title, Inc v Alpena County, 84 Mich App 308, 318; 269 NW2d 578 (1978).

Finally, Appellee's contention that Appellants and other County Treasurers have attempted to create new law with respect to the fees is illogical. The Legislature has specifically mandated the fee County Treasurers **must** charge. The County Treasurers have created no new legislation. Any charge for providing a public record must come from the Legislature. Tallman v Cheboygan Area Schools, 183 Mich App 123, 130; 454 NW2d 171 (1990). This is precisely what the Legislature has mandated in both FOIA and in the Transcripts and Abstracts of Records Act.

F. APPELLEE'S "WINDFALL" ARGUMENT

Appellee argued below that Appellants and other County Treasurers will be granted a "windfall" if they are permitted to charge fees in accordance with the Transcripts and Abstracts of Records Act. This argument is a red herring. Neither Appellants nor any of the other County Treasurers will be granted a "windfall", because the Treasurers will merely charge Appellee the same fees which are incurred by every other person or entity requesting information which falls under the Transcripts and Abstracts of Records Act.

If there is a windfall to be had, it would be to Appellee if the Court of Appeals decision in the Oakland County case is allowed to stand. There can be no doubt that Appellee intends to use the here-requested information for commercial purposes. As stated by the court in Kestenbaum v MSU, 97 Mich App 5, 22-23; 294 NW2d 228 (1980), aff'd, 414 Mich 510 (1984):

> One other factor bears significantly on our decision. It is a well-established principle of law that public funds may not be used to support a private purpose. To require the university to surrender property of commercial value to a private party when the information required can be released without surrendering the public property, contravenes the established rule of law. Const 1963, art. 9, §18; Skutt v Grand Rapids 275 Mich 258, 266 NW 344 (1936).
>
> Neither the preamble to the FOIA nor its purpose states it was the intent of the Legislature to surrender publicly- owned property free of charge to private enterprise. The computer tape which plaintiff requested constitutes publicly-owned property of commercial value aside from the information contained thereon. Defendant thus should not have been required to provide plaintiff with such property.

Here, Appellee is seeking a windfall which is not available to citizens or private businesses who lack Appellee's computer technology. Under Appellee's argument,

citizens and businesses with computers would be able to obtain the above requested records at a significant reduction from those individuals who do not own computers and, thus, are required to obtain paper copies. This, simply, cannot be the intent of the Legislature.

CONCLUSION AND RELIEF

It is clear that the only appropriate interpretation in this matter is that the specific statute, the Transcripts and Abstracts of Records Act, is controlling over the more general fee schedule provided in FOIA. This conclusion is supported by the specific exemptions set forth in FOIA for other statutes that provide for a specific fee, the Reproduction of Public Records Act, and is also consistent with the long existing rules for statutory interpretation. It is also supported by the Court of Appeals initial Opinion in this appeal. However, if this Court were to accept the Court of Appeals' and Appellee's "form over substance" interpretation of FOIA, and negate the Transcripts and Abstracts of Records Act, it would virtually eliminate the provision of the FOIA statute which expressly provides for specific exemptions, and it would significantly modify the subsections of FOIA which clearly define both public record and writing.

Conversely, Appellants' "substance" over "form" position would give full force and effect to both the FOIA statute and all of its provisions, and the Transcripts and Abstracts of Records Act, and would be consistent with the rules of statutory construction.

For all the foregoing reasons, Defendants/Appellants respectfully request that this Honorable Court reverse the Opinion and Order of the Court of Appeals and the Opinion and Order of the Livingston Circuit Court, and grant Defendants/Appellants such other and further relief as justice may require.

Respectfully submitted,

COHL, STOKER, TOSKEY & McGLINCHEY, P.C.

Date: May 23, 2003

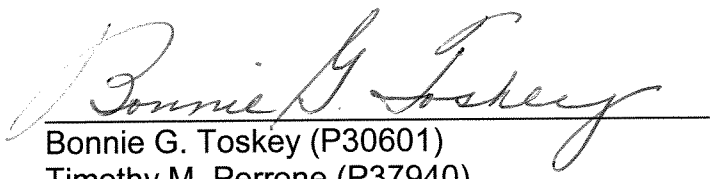
By: 

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EXHIBIT A

Allegan County Building
P.O. Box 259
Allegan, Michigan 49010-0259
(616) 673-0260
Fax (616) 673-6094

County of Allegan

FULTON J. SHEEN
County Treasurer

SALLY BROOKS
Chief Deputy Treasurer
ALICE RIDLINGTON
Deputy Treasurer

August 19, 1998

Richard VanderBroek
Freedom of Information Act Officer
Title Office
P.O. 2279
Holland, MI 49010

Re: FOIA request for the 1995, 1996, and 1997 Tax Roll

Dear Mr. VanderBroek:

This is in response to your August 14, 1998 Freedoms of Information Act (FOIA) request for a complete computer copy of the 1995, 1996, and 1997 delinquent tax roll.

Nothing has changed since the last FOIA request you made. The Ottawa County Circuit Court decision to which you referred applies to Ingham County only and thus is not binding on Allegan County. Furthermore a request has been filed for a rehearing of that case in September. Thus until the Legislature changes the statute amount of 25¢ in M.C.L.§48.101, we are bound by law to charge 25¢.

This fee schedule remains applicable when the records are requested pursuant to FOIA M.C.L. § 15.234(4). Understand that these numbers change daily and that they will be obsolete the day you receive them. The three rolls you requested constitute approximately **15,104** delinquent abstracts as of 8/19/98, which would result in a statutory fee of approximately **$3,776.00** for the delinquent information. Current parcel counts as of October 1997, **54,225** for a total of **69,329** parcels. Total cost **$17,332.25**. Because of the unusually high fee for this production, our office requests that you provide a good faith deposit of one-half of the total-estimated fee, if you wish us to provide this information.

Additionally, you should be aware that data files stored by Allegan County's computers are not in the exact format which you requested. The information needed to compile your requested rolls are contained in separate data files, which are combined by the Allegan County's computer program to provide the printed output. Because we have never tried to copy this information for another data base, we are uncertain if it is readable by other computer programs.[1]

---

[1]The computer program used by Allegan County is unique to Allegan County government, and computer software is not subject to FOIA, pursuant to MCL § 15.232(f)

Upon receipt of your good faith deposit we will begin processing your request.

If you have any questions regarding this, do not hesitate to contact me.

Sincerely,

Fulton J. Sheen
Allegan County Treasurer

FJS/sm

(616) 527-5329
(616) 527-5323 FAX

County of Ionia
COURTHOUSE
100 MAIN ST. — IONIA, MI 48846
NANCY HICKEY
TREASURER

8-18-98

Mr. Richard VanderBroek
Title Office – Corporate Services
P.O. Box 2279
Holland, MI 49422

Dear Mr. VanderBroek:

RE: Freedom of Information Act Request
For Tax Information (letter dated 8-14-98)

I received your letter requesting property tax records for Ionia County for 1995, 1996, and 1997.

I am unsure as to what exactly you are requesting. It would appear that you do not want any delinquent tax information. This office just went on computers on 1-1-98 and delinquent taxes are available by diskette.

This office houses the individual tax rolls that are turned over by the local treasurers. The only year that is available on the computer is the 1997 tax collection year.

Please advise me exactly what information you want to enable me to process your request.

Sincerely,

Nancy Hickey
Treasurer

CC: Ray Vogt – FOI Officer
File

616) 527-5329
616) 527-5323 FAX

County of Ionia
COURTHOUSE
100 MAIN ST. — IONIA, MI 48846
NANCY HICKEY
TREASURER

8-24-98

Mr. Richard VanderBroek
Title Office – Corporate Services
P.O. Box 2279
Holland, MI 48422

Dear Mr. VanderBroek:

RE: Freedom of Information Request

As per our telephone conversion of 8-20-98, I am submitting the cost for exporting of data as discussed by us last week.

The costs are as follows:

Export of 1997 Tax Rolls @ $.25 per page plus Labor	$ 1,807.72
Export of Delinquent Tax Roll @ $.25 per page Plus Labor	$ 694.48
TOTAL	$ 2,502.20

Please make check payable to:

IONIA COUNTY TREASURER
100 MAIN ST. COURTHOUSE
IONIA, MI 48846

Upon receipt of your check, I will export data and mail it to you on 3 ½" diskette.

Sincerely,

Nancy Hickey

Nancy Hickey
Treasurer

CC: Ray Vogt – FOI Officer
File

LAW OFFICES
ROSENFELD, GROVER & FRANG, P.C.
601 SOUTH JACKSON STREET
P.O. BOX 1405
JACKSON, MICHIGAN 492041405

TELEPHONE (517) 788-6270
FAX (517) 788-9893

ROBERT M. GROVER
JAMES E. FRANG

RICHARD Z. ROSENFELD
OF COUNSEL

August 26, 1998

Mr. Richard Vander Broek
Title Office, Corporate Services
P. O. Box 2279
Holland, Michigan 49422

Re: Freedom of Information Act Request

Dear Mr. Vander Broek:

We have been asked to respond to your Freedom of Information Act Request dated August 14, 1998 and received by Jackson County on August 20, 1998.

You have requested an electronic copy of the tapes or files that contain the 1995, 1996 and 1997 property tax records of Jackson County.

Jackson County is willing to provide such records upon payment of the statutory fee of $.25 per abstract as required by MCL Section 48.101. Section 4(4) of the FOIA provides that Section 4, which permits a public body to charge actual mailing costs and actual incremental costs for providing copies of public records, does not apply if the amount of the fee for providing a copy of the public record is otherwise specifically provided by an act or statute.

The decision of the Ottawa County Circuit Court mentioned in your request is not binding on Jackson County, is clearly in error and will be reversed on appeal.

In sum, your FOIA request is granted. The records requested will be provided upon payment of the statutory fee.

Very truly yours,

Robert M. Grover

RMG/mas
cc: Janet Rochefort,
Jackson County Treasurer
Joni Johnson,
Deputy Director Human Resources

KALAMAZOO COUNTY GOVERNMENT

BOARD OF COMMISSIONERS

201 WEST KALAMAZOO AVENUE • KALAMAZOO, MICHIGAN 49007-3777
PHONE (616) 384-8111 FAX (616) 383-8862

CHARLOTTE B. SUMNEY
CHAIRPERSON

EVA OZIER
VICE CHAIRPERSON

September 15, 1998

The Title Office, Inc.
ATTN: Mr. Richard VanderBroeck
P.O. Box 2279
Holland, MI. 49422

Re: Property Tax Records

Dear Mr. VanderBroeck:

This letter is intended to confirm our discussion and agreements regarding the Freedom of Information Act (FOIA) request you recently sent to Herman Drenth, the Kalamazoo County Treasurer. In your FOIA request you asked for a copy of the Treasurer's Office's property tax records and provided a description of the form in which you wanted those records (e.g. a computerized forum).

There is no dispute that you are legally entitled to receive the information which you requested and the Kalamazoo County Treasurer will provide that information. However, a disagreement may exist as to whether the Kalamazoo County Treasurer is required to charge for the requested records under the Freedom of Information Act (e.g. the actual cost method) or the Title and Abstract Act (e.g. a minimum of $0.25 per property). There are arguments to support charging under either statute and litigation has been initiated in Ottawa and Oakland Counties over the issue of fees.

It is my hope that your office and the Kalamazoo County Treasurer's Office can reach a reasonable and appropriate resolution of the fee issue without resorting to litigation. To that end, I asked, and you agreed, to extend the Treasurer's time for responding to your FOIA request until we have had an opportunity to discuss the fee issue in more depth. I also promised to discuss your FOIA request with the County's Information Systems Director to see if the computer tape of the Delinquent Tax Roll that the County provides to the local newspaper in connection with the Annual Tax sale would satisfy/comply with

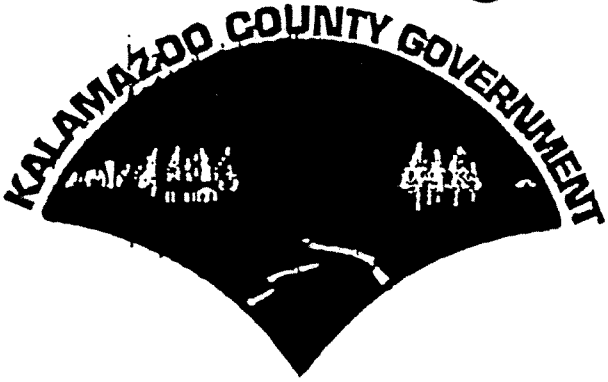
your FOIA request. Finally, we agreed that neither the County nor your office will initiate legal action until we both agree that we have reached an impasse on the fee issue.

I will discuss this matter with Mr. Drenth as soon as possible. Mr. Drenth is presently attending a conference but I anticipate that he will return to his office by Thursday September 17, 1998. Thank you for your time and patience in this matter. If your recollection of our discussion and agreements differs from that outlined in this letter please contact me at your convenience.

Very truly yours,

KALAMAZOO COUNTY BOARD OF COMMISSIONERS

Thomas M. Canny
Assistant Corporation Counsel



BOARD OF COMMISSIONERS

201 WEST KALAMAZOO AVENUE • KALAMAZOO, MICHIGAN 49007-3777
PHONE (616) 384-8111 FAX (616) 383-8862

CHARLOTTE B. SUMNEY
CHAIRPERSON

EVA OZIER
VICE CHAIRPERSON

October 13, 1998

The Title Office, Inc.
ATTN: Mr. Richard VanderBroeck
P.O. Box 2279
Holland, MI. 49422

Re: Property Tax Records

Dear Mr. VanderBroeck:

I apologize for not writing to you earlier and I wish to thank you for your patience. I have thoroughly discussed your *Freedom of Information Act* (*FOIA*) request with the Kalamazoo County Treasurer, Mr. Herman Drenth, and with the Kalamazoo County Corporation Counsel, Mr. Duane Triemstra. Mr. Drenth agrees that the information you requested constitutes a public record as defined in Section 2(c) of the *FOIA* [e.g. MCL 15.232(c)] and Mr. Drenth agrees to provide you with copies of those records in a mutually agreeable format.

Mr. Drenth disagrees with your position that Section 4(1) of the *FOIA* [e.g. MCL 15.234(1)] sets the fee for the copies of the public records. As you are aware, Section 4(1) establishes a general *FOIA* fee equal to the public body's actual costs of producing the copies of the public records. Instead, Mr. Drenth asserts that Section 4(4) of the *FOIA* [e.g. MCL 15.234(4)] establishes the charges for the public records. Section 4(4) provides, in relevant part, that the "actual cost" provisions of Section 4(1) do not apply when a statute specifically authorizes the sale of the public records or when a statute specifically sets a fee for providing copies of the public records. Mr. Drenth asserts that the *Transcripts and Abstracts of Records Act* [e.g. MCL 48.101] is a statute which specifically authorizes the sale of the requested public records and/or which specifically sets a fee for copies of the public record. The fee established under the *Transcripts and Abstracts of Records Act* is $0.25 for each description of land contained in the public record(s).

Mr. Drenth is also aware that the Title Company, Inc., has prevailed in an action in the Ottawa Circuit Court which ruled that the fee provisions of the *FOIA* control over the provisions of the *Transcripts and Abstracts of Records Act* whenever a person requests the complete property records in a computer medium. Mr. Drenth is also aware that the Oakland County Treasurer has initiated a Declaratory Judgment action against the Title Company, Inc., in the Oakland County Circuit Court for the purpose of having the *Transcripts and Abstracts of Records Act* declared to be the controlling statute. Mr. Drenth also acknowledges, that neither the Ottawa County action nor the Oakland County action involve the Kalamazoo County Treasurer's Office and, therefore, neither action automatically constitutes binding precedent in Kalamazoo County.

Based upon our previous discussion, it is my understanding that you would not be interested in receiving the requested public record if you have to pay $0.25 per property. Mr. Drenth suggests that, if you do not immediately require copies of the requested record, you and the Treasurer's Office agree to place your request "on hold" until the Michigan Court of Appeals issues a final decision on which statutory fee applies to your FOIA request (Mr. Drenth anticipates that Ingham County will appeal the Ottawa County Circuit Court decision and that the non-prevailing party in the Oakland County Circuit Court action will appeal that decision). Alternatively, Mr. Drenth would be willing to initiate a Declaratory Judgment action in the Kalamazoo County Circuit Court or to petition the Oakland County Circuit Court for permission to intervene in that pending action. However, I do not know if the Oakland County Treasurer or the Oakland County Circuit Court would agree to permit the intervention. I am interested in hearing your thoughts on this issue and would be interested in hearing any other solution which you think would be appropriate.

I appreciate your time and attention to this matter and look forward to hearing your response to the suggestions contained in this letter. If you have any questions, comments or concerns regarding this letter please feel free to contact me at your convenience.

Very truly yours,

KALAMAZOO COUNTY BOARD OF COMMISSIONERS

Thomas M. Canny

Thomas M. Canny
Assistant Corporation Counsel

[redacted].WPD

END

DIANNE H. HARDY
LIVINGSTON COUNTY TREASURER

LIVINGSTON COUNTY COURTHOUSE
HOWELL, MICHIGAN 48843-2398 (517) 546-7010

September 14, 1998

VIA FACSIMILE

Mr. Richard Vander Broek
The Title Office, Inc.
P. O. Box 2279
Holland, MI 49422-2279

Re: Freedom of Information Act Request

Dear Mr. Vander Broek:

This letter is in response to your Freedom of Information Act ("FOIA") request received in this office on August 19, 1998. You have requested "an electronic copy of the tapes or files that contain the 1995, 1996 and 1997 property tax records of Livingston County." Your request for "an electronic copy of the tapes or files that contain the 1995, 1996 and 1997 property tax records of Livingston County" is hereby granted to the extent such documents exist and are available.

MCL 48.101 mandates a county treasurer charge a fee of $.25 per abstract for providing the requested information. This fee schedule is mandatory and controls over the general fee provisions under the Freedom of Information Act. [MCL 15.234(4)]. I do not believe that I have any choice but to follow this fee schedule.

Your request constitutes approximately 255,000 abstracts, which would result in a statutory fee of approximately $63,750. Because of the unusually high fee for this production, our office requests that you provide a good faith deposit of one-half of the total estimated fee if you wish for us to provide this information.

If you have any questions or concerns, please do not hesitate to contact me.

Very truly yours,

Jamie M. Palmer, Deputy

Dianne H. Hardy
Livingston County Treasurer

Van Buren County
Office of County Treasurer
Courthouse, 212 East Paw Paw Street
Paw Paw Michigan 49079-1499

Karen Ma.. [redacted] easurer
Karen MacDonald, Chief Deputy
Phone (616) 657-8228
Fax (616) 657-2547

August 20, 1998

Richard VanderBroek
Freedom of Information Act Officer
Title Office
PO Box 2279
Holland MI 49010

Re: FOIA request for the 1995, 1996 and 1997 Tax Roll

Dear Mr. VanderBroek:

This is in response to your August 14, 1998 Freedom of Information Act (FOIA) request for a complete computer copy of the 1995, 1996 & 1997 tax rolls.

Nothing has changed since the last FOIA request you made. The Ottawa County Circuit Court decision to which you referred applies to Ingham County only and thus is not binding on Van Buren County. Furthermore a request has been filed for a rehearing of that case in September. Thus until the Legislature changes the statute amount of $ .25 in MCL 48.101, we are bound by law to charge $ .25.

This fee schedule remains applicable when the records are requested pursuant to FOIA MCL 15.234(4). Understand that these numbers change daily and that they will be obsolete the day you receive them. Each of the three rolls you requested contain approximately 45,000 records, which would result in a statutory fee of approximately $33,750.00. Because of the unusually high fee for this production, our office requested that you provide a good faith deposit of one-half of the total estimated fee, if you with us to provide this information.

Additionally, you should be aware that the data files stored by Van Buren County's computers are not in the exact format, which you requested. The information needed to compile your requested rolls are contained in separate data files, which are combined by the Van Buren County computer program to provide the printed output. Because we have never tried to copy this information for another data base, we are uncertain if it is readable by other computer programs.[1]

---

[1] The computer program used by Van Buren County is unique to Van Buren County government and computer software is not subject to FOIA, pursuant to MCL 15.232(f).

Upon receipt of your good faith deposit we will begin processing your request. If you have any questions regarding this, please feel free to contact me.

Very truly yours,

Karen Makay
Van Buren County Treasurer

KM/kdm

EXHIBIT B

August 14, 1998

Freedom of Information Act Officer
Allegan County

Mr. Fulton Sheen or FOIA Officer
Allegan County Treasurer
113 Chestnut St.
Allegan, MI 49010

Re: **Freedom of Information Act Request**

Dear Mr. Sheen or FOIA Officer:

Pursuant to the Michigan Freedom of Information Act, The Title Office, Inc. requests an electronic copy of the tapes or files that contain the 1995, 1996, and 1997 property tax records of Allegan County.

Unfortunately, The Title Office does not know how Allegan County maintains its computer system and files on that system. Specifically, The Title Office prefers a copy of the database or data files that contain these records extracted to PC computer diskettes in ASCII format. Please advise me of other common delimited formats of extraction available, if you are unable to reproduce the information in our preferred fashion.

I would assume that Allegan County maintains backup tapes of its files. If that is the case and you are unable to export the files as specified above, The Title Office seeks a copy of the most recent backup tape or tapes that contain the 1995, 1996, and 1997 property tax records of Allegan County.

Other counties have reproduced their files on 31/2 inch PC diskette, 9-track reel or compact disc when responding to similar requests by The Title Office. The Title Office will gladly provide the medium necessary for Allegan County to reproduce the files. Please call me if you would like The Title Office to provide these materials.

As you probably know, the FOIA permits a public body to charge a fee equal to the actual incremental costs of reproducing the record requested. The Title Office is willing to pay an agreed upon deposit and fee according to the fee provisions of the FOIA. See MCL § 15.234. The Title Office previously issued a FOIA request to Ingham County for similar records. In response to this request, Ingham County argued that it was entitled to charge the statutory fee

of $.25 per abstract set forth under MCL § 48.101. The Title Office did not agree with Ingham County's position then and it does not agree with any such argument now.

Since our earlier request, several counties have reproduced electronic copies of their property tax records to The Title Office. In reproducing these records, the counties did not charge the statutory abstract fee under MCL 48.101. Moreover, the only court that has addressed this issue agreed with The Title Office and ruled that the statutory abstract fee did not apply to the request by The Title Office. In June 1998, the Ottawa County Circuit Court ruled that the statutory fee relating to the production of abstracts does not apply to the request by The Title Office. The court ruled that the fee provisions under FOIA govern the amount a county is entitled to charge. As part of its reasoning, the court stated that the FOIA fee provisions and the fee provision under the abstract statute are designed to reimburse the county its costs in reproducing the record. The statutes do not permit a county to make a profit when reproducing its records.

Please call me if I can offer assistance with this request or if you have any questions. My direct telephone number is 616 394-4343 ext.24. My e-mail address is richvb@titleoffice.com .

Very truly yours,

Richard Vander Broek

CORPORATE SERVICES
P.O. BOX 2279 / HOLLAND, MI 49422

August 14, 1998

Freedom of Information Act Officer
Hillsdale County

Mr. Gary Leininger or FOIA Officer
Hillsdale County Treasurer
Hillsdale County Courthouse
Hillsdale, MI 49242

Re: **Freedom of Information Act Request**

Dear Mr. Leininger or FOIA Officer:

Pursuant to the Michigan Freedom of Information Act, The Title Office, Inc. requests an electronic copy of the tapes or files that contain the 1995, 1996, and 1997 property tax records of Hillsdale County.

Unfortunately, The Title Office does not know how Hillsdale County maintains its computer system and files on that system. Specifically, The Title Office prefers a copy of the database or data files that contain these records extracted to PC computer diskettes in ASCII format. Please advise me of other common delimited formats of extraction available, if you are unable to reproduce the information in our preferred fashion.

I would assume that Hillsdale County maintains backup tapes of its files. If that is the case and you are unable to export the files as specified above, The Title Office seeks a copy of the most recent backup tape or tapes that contain the 1995, 1996, and 1997 property tax records of Hillsdale County.

Other counties have reproduced their files on 3 1/2 inch PC diskette, 9-track reel or compact disc when responding to similar requests by The Title Office. The Title Office will gladly provide the medium necessary for Hillsdale County to reproduce the files. Please call me if you would like The Title Office to provide these materials.

As you probably know, the FOIA permits a public body to charge a fee equal to the actual incremental costs of reproducing the record requested. The Title Office is willing to pay an agreed upon deposit and fee according to the fee provisions of the FOIA. See MCL § 15.234. The Title Office previously issued a FOIA request to Ingham County for similar records. In response to this request, Ingham County argued that it was entitled to charge the statutory fee

of $.25 per abstract set forth under MCL § 48.101. The Title Office did not agree with Ingham County's position then and it does not agree with any such argument now.

Since our earlier request, several counties have reproduced electronic copies of their property tax records to The Title Office. In reproducing these records, the counties did not charge the statutory abstract fee under MCL 48.101. Moreover, the only court that has addressed this issue agreed with The Title Office and ruled that the statutory abstract fee did not apply to the request by The Title Office. In June 1998, the Ottawa County Circuit Court ruled that the statutory fee relating to the production of abstracts does not apply to the request by The Title Office. The court ruled that the fee provisions under FOIA govern the amount a county is entitled to charge. As part of its reasoning, the court stated that the FOIA fee provisions and the fee provision under the abstract statute are designed to reimburse the county its costs in reproducing the record. The statutes do not permit a county to make a profit when reproducing its records.

Please call me if I can offer assistance with this request or if you have any questions. My direct telephone number is 616 394-4343 ext.24. My e-mail address is richvb@titleoffice.com.

Very truly yours,

Richard Vander Broek

CORPORATE SERVICES
P.O. BOX 2279 / HOLLAND, MI 49422

August 14, 1998

Freedom of Information Act Officer
Ionia County

Ms. Nancy Hicki or FOIA Officer
Ionia County Treasurer
100 Main Street
Ionia MI 48846

Re: **Freedom of Information Act Request**

Dear Ms. Hicki or FOIA Officer:

Pursuant to the Michigan Freedom of Information Act, The Title Office, Inc. requests an electronic copy of the tapes or files that contain the 1995, 1996, and 1997 property tax records of Ionia County.

Unfortunately, The Title Office does not know how Ionia County maintains its computer system and files on that system. Specifically, The Title Office prefers a copy of the database or data files that contain these records extracted to PC computer diskettes in ASCII format. Please advise me of other common delimited formats of extraction available, if you are unable to reproduce the information in our preferred fashion.

I would assume that Ionia County maintains backup tapes of its files. If that is the case and you are unable to export the files as specified above, The Title Office seeks a copy of the most recent backup tape or tapes that contain the 1995, 1996, and 1997 property tax records of Ionia County.

Other counties have reproduced their files on 3 1/2 inch PC diskette, 9-track reel or compact disc when responding to similar requests by The Title Office. The Title Office will gladly provide the medium necessary for Ionia County to reproduce the files. Please call me if you would like The Title Office to provide these materials.

As you probably know, the FOIA permits a public body to charge a fee equal to the actual incremental costs of reproducing the record requested. The Title Office is willing to pay an agreed upon deposit and fee according to the fee provisions of the FOIA. See MCL § 15.234. The Title Office previously issued a FOIA request to Ingham County for similar records. In response to this request, Ingham County argued that it was entitled to charge the statutory fee

of $.25 per abstract set forth under MCL § 48.101. The Title Office did not agree with Ingham County's position then and it does not agree with any such argument now.

Since our earlier request, several counties have reproduced electronic copies of their property tax records to The Title Office. In reproducing these records, the counties did not charge the statutory abstract fee under MCL 48.101. Moreover, the only court that has addressed this issue agreed with The Title Office and ruled that the statutory abstract fee did not apply to the request by The Title Office. In June 1998, the Ottawa County Circuit Court ruled that the statutory fee relating to the production of abstracts does not apply to the request by The Title Office. The court ruled that the fee provisions under FOIA govern the amount a county is entitled to charge. As part of its reasoning, the court stated that the FOIA fee provisions and the fee provision under the abstract statute are designed to reimburse the county its costs in reproducing the record. The statutes do not permit a county to make a profit when reproducing its records.

Please call me if I can offer assistance with this request or if you have any questions. My direct telephone number is 616 394-4343 ext.24. My e-mail address is richvb@titleoffice.com.

Very truly yours,

Richard Vander Broek

CORPORATE SERVICES
P.O. BOX 2279 / HOLLAND, MI 49422

August 14, 1998

Freedom of Information Act Officer
Jackson County

Ms. Janet Rochefort or FOIA Officer
Jackson County Treasurer
120 W Michigan Avenue
Jackson MI 49201

Re: **Freedom of Information Act Request**

Dear Ms. Rochefort or FOIA Officer:

Pursuant to the Michigan Freedom of Information Act, The Title Office, Inc. requests an electronic copy of the tapes or files that contain the 1995, 1996, and 1997 property tax records of Jackson County.

Unfortunately, The Title Office does not know how Jackson County maintains its computer system and files on that system. Specifically, The Title Office prefers a copy of the database or data files that contain these records extracted to PC computer diskettes in ASCII format. Please advise me of other common delimited formats of extraction available, if you are unable to reproduce the information in our preferred fashion.

I would assume that Jackson County maintains backup tapes of its files. If that is the case and you are unable to export the files as specified above, The Title Office seeks a copy of the most recent backup tape or tapes that contain the 1995, 1996, and 1997 property tax records of Jackson County.

Other counties have reproduced their files on 3 1/2 inch PC diskette, 9-track reel or compact disc when responding to similar requests by The Title Office. The Title Office will gladly provide the medium necessary for Jackson County to reproduce the files. Please call me if you would like The Title Office to provide these materials.

As you probably know, the FOIA permits a public body to charge a fee equal to the actual incremental costs of reproducing the record requested. The Title Office is willing to pay an agreed upon deposit and fee according to the fee provisions of the FOIA. See MCL § 15.234. The Title Office previously issued a FOIA request to Ingham County for similar records. In response to this request, Ingham County argued that it was entitled to charge the statutory fee

of $.25 per abstract set forth under MCL § 48.101. The Title Office did not agree with Ingham County's position then and it does not agree with any such argument now.

Since our earlier request, several counties have reproduced electronic copies of their property tax records to The Title Office. In reproducing these records, the counties did not charge the statutory abstract fee under MCL 48.101. Moreover, the only court that has addressed this issue agreed with The Title Office and ruled that the statutory abstract fee did not apply to the request by The Title Office. In June 1998, the Ottawa County Circuit Court ruled that the statutory fee relating to the production of abstracts does not apply to the request by The Title Office. The court ruled that the fee provisions under FOIA govern the amount a county is entitled to charge. As part of its reasoning, the court stated that the FOIA fee provisions and the fee provision under the abstract statute are designed to reimburse the county its costs in reproducing the record. The statutes do not permit a county to make a profit when reproducing its records.

Please call me if I can offer assistance with this request or if you have any questions. My direct telephone number is 616 394-4343 ext.24. My e-mail address is richvb@titleoffice.com.

Very truly yours,

Richard Vander Broek

CORPORATE SERVICES
P.O. BOX 2279 / HOLLAND, MI 49422

August 14, 1998

Freedom of Information Act Officer
Kalamazoo County

Mr. Herman Drenth or FOIA Officer
Kalamazoo County Treasurer
201 W Kalamazoo Avenue
Kalamazoo MI 49007

Re: **Freedom of Information Act Request**

Dear Mr. Drenth or FOIA Officer:

Pursuant to the Michigan Freedom of Information Act, The Title Office, Inc. requests an electronic copy of the tapes or files that contain the 1995, 1996, and 1997 property tax records of Kalamazoo County.

Unfortunately, The Title Office does not know how Kalamazoo County maintains its computer system and files on that system. Specifically, The Title Office prefers a copy of the database or data files that contain these records extracted to PC computer diskettes in ASCII format. Please advise me of other common delimited formats of extraction available, if you are unable to reproduce the information in our preferred fashion.

I would assume that Kalamazoo County maintains backup tapes of its files. If that is the case and you are unable to export the files as specified above, The Title Office seeks a copy of the most recent backup tape or tapes that contain the 1995, 1996, and 1997 property tax records of Kalamazoo County.

Other counties have reproduced their files on 3 1/2 inch PC diskette, 9-track reel or compact disc when responding to similar requests by The Title Office. The Title Office will gladly provide the medium necessary for Kalamazoo County to reproduce the files. Please call me if you would like The Title Office to provide these materials.

As you probably know, the FOIA permits a public body to charge a fee equal to the actual incremental costs of reproducing the record requested. The Title Office is willing to pay an agreed upon deposit and fee according to the fee provisions of the FOIA. See MCL § 15.234. The Title Office previously issued a FOIA request to Ingham County for similar records. In response to this request, Ingham County argued that it was entitled to charge the statutory fee

of $.25 per abstract set forth under MCL § 48.101. The Title Office did not agree with Ingham County's position then and it does not agree with any such argument now.

Since our earlier request, several counties have reproduced electronic copies of their property tax records to The Title Office. In reproducing these records, the counties did not charge the statutory abstract fee under MCL 48.101. Moreover, the only court that has addressed this issue agreed with The Title Office and ruled that the statutory abstract fee did not apply to the request by The Title Office. In June 1998, the Ottawa County Circuit Court ruled that the statutory fee relating to the production of abstracts does not apply to the request by The Title Office. The court ruled that the fee provisions under FOIA govern the amount a county is entitled to charge. As part of its reasoning, the court stated that the FOIA fee provisions and the fee provision under the abstract statute are designed to reimburse the county its costs in reproducing the record. The statutes do not permit a county to make a profit when reproducing its records.

Please call me if I can offer assistance with this request or if you have any questions. My direct telephone number is 616 394-4343 ext.24. My e-mail address is richvb@titleoffice.com.

Very truly yours,

Richard Vander Broek

CORPORATE SERVICES
P.O. BOX 2279 / HOLLAND, MI 49422

August 14, 1998

Freedom of Information Act Officer
Livingston County

Ms. Diane Hardy or FOIA Officer
Livingston County Treasurer
200 East Grand River
Howell, MI 48843

Re: **Freedom of Information Act Request**

Dear Ms. Hardy or FOIA Officer:

Pursuant to the Michigan Freedom of Information Act, The Title Office, Inc. requests an electronic copy of the tapes or files that contain the 1995, 1996, and 1997 property tax records of Livingston County.

Unfortunately, The Title Office does not know how Livingston County maintains its computer system and files on that system. Specifically, The Title Office prefers a copy of the database or data files that contain these records extracted to PC computer diskettes in ASCII format. Please advise me of other common delimited formats of extraction available, if you are unable to reproduce the information in our preferred fashion.

I would assume that Livingston County maintains backup tapes of its files. If that is the case and you are unable to export the files as specified above, The Title Office seeks a copy of the most recent backup tape or tapes that contain the 1995, 1996, and 1997 property tax records of Livingston County.

Other counties have reproduced their files on 3 1/2 inch PC diskette, 9-track reel or compact disc when responding to similar requests by The Title Office. The Title Office will gladly provide the medium necessary for Livingston County to reproduce the files. Please call me if you would like The Title Office to provide these materials.

As you probably know, the FOIA permits a public body to charge a fee equal to the actual incremental costs of reproducing the record requested. The Title Office is willing to pay an agreed upon deposit and fee according to the fee provisions of the FOIA. See MCL § 15.234. The Title Office previously issued a FOIA request to Ingham County for similar records. In response to this request, Ingham County argued that it was entitled to charge the statutory fee

of $.25 per abstract set forth under MCL § 48.101. The Title Office did not agree with Ingham County's position then and it does not agree with any such argument now.

Since our earlier request, several counties have reproduced electronic copies of their property tax records to The Title Office. In reproducing these records, the counties did not charge the statutory abstract fee under MCL 48.101. Moreover, the only court that has addressed this issue agreed with The Title Office and ruled that the statutory abstract fee did not apply to the request by The Title Office. In June 1998, the Ottawa County Circuit Court ruled that the statutory fee relating to the production of abstracts does not apply to the request by The Title Office. The court ruled that the fee provisions under FOIA govern the amount a county is entitled to charge. As part of its reasoning, the court stated that the FOIA fee provisions and the fee provision under the abstract statute are designed to reimburse the county its costs in reproducing the record. The statutes do not permit a county to make a profit when reproducing its records.

Please call me if I can offer assistance with this request or if you have any questions. My direct telephone number is 616 394-4343 ext.24. My e-mail address is richvb@titleoffice.com.

Very truly yours,

Richard Vander Broek

CORPORATE SERVICES
P.O. BOX 2279 / HOLLAND, MI 49422

August 14, 1998

Freedom of Information Act Officer
Van Buren County

Ms. Karen Makay or FOIA Officer
Van Buren County Treasurer
212 Paw Paw St.
Paw Paw MI 49079

Re: **Freedom of Information Act Request**

Dear Ms. Makay or FOIA Officer:

Pursuant to the Michigan Freedom of Information Act, The Title Office, Inc. requests an electronic copy of the tapes or files that contain the 1995, 1996, and 1997 property tax records of Van Buren County.

Unfortunately, The Title Office does not know how Van Buren County maintains its computer system and files on that system. Specifically, The Title Office prefers a copy of the database or data files that contain these records extracted to PC computer diskettes in ASCII format. Please advise me of other common delimited formats of extraction available, if you are unable to reproduce the information in our preferred fashion.

I would assume that Van Buren County maintains backup tapes of its files. If that is the case and you are unable to export the files as specified above, The Title Office seeks a copy of the most recent backup tape or tapes that contain the 1995, 1996, and 1997 property tax records of Van Buren County.

Other counties have reproduced their files on 3 1/2 inch PC diskette, 9-track reel or compact disc when responding to similar requests by The Title Office. The Title Office will gladly provide the medium necessary for Van Buren County to reproduce the files. Please call me if you would like The Title Office to provide these materials.

As you probably know, the FOIA permits a public body to charge a fee equal to the actual incremental costs of reproducing the record requested. The Title Office is willing to pay an agreed upon deposit and fee according to the fee provisions of the FOIA. See MCL § 15.234. The Title Office previously issued a FOIA request to Ingham County for similar records. In response to this request, Ingham County argued that it was entitled to charge the statutory fee

of $.25 per abstract set forth under MCL § 48.101. The Title Office did not agree with Ingham County's position then and it does not agree with any such argument now.

Since our earlier request, several counties have reproduced electronic copies of their property tax records to The Title Office. In reproducing these records, the counties did not charge the statutory abstract fee under MCL 48.101. Moreover, the only court that has addressed this issue agreed with The Title Office and ruled that the statutory abstract fee did not apply to the request by The Title Office. In June 1998, the Ottawa County Circuit Court ruled that the statutory fee relating to the production of abstracts does not apply to the request by The Title Office. The court ruled that the fee provisions under FOIA govern the amount a county is entitled to charge. As part of its reasoning, the court stated that the FOIA fee provisions and the fee provision under the abstract statute are designed to reimburse the county its costs in reproducing the record. The statutes do not permit a county to make a profit when reproducing its records.

Please call me if I can offer assistance with this request or if you have any questions. My direct telephone number is 616 394-4343 ext.24. My e-mail address is richvb@titleoffice.com.

Very truly yours,

Richard Vander Broek

CORPORATE SERVICES
P.O. BOX 2279 / HOLLAND, MI 49422

EXHIBIT C

(Videotape A, 9/29/99, at 1:53 p.m.)

STATE OF MICHIGAN

IN THE 22ND CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

CATHERINE MCCLARY,
Washtenaw County Treasurer,

Plaintiff.

V

Case No. 99-1[illegible]618-CZ

THE TITLE OFFICE, INC.,
a Michigan Corporation,

Defendant.

_____/

MOTION FOR SUMMARY DISPOSITION

BEFORE THE HONORABLE DAVID S. SWARTZ, CIRCUIT COURT JUDGE

Ann Arbor, Michigan - Wednesday, September 29, 1999

APPEARANCES:

For the Plaintiff:
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RECORDED BY
VIDEO RECORDER

TRANSCRIBED BY:
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Certified Electronic Reporter
(734) 994-2554

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Ann Arbor, Michigan

Wednesday, September 29, 1999 - at 1:53 p.m.

THE CLERK: McClary versus Title Office, Inc., case number 99-10618-CZ.

MR. HEDGER: Ready, your Honor.

MR. GRAVELYN: Ready, your Honor.

MR. HEDGER: Your Honor, Curt Hedger, Office of Corporation Counsel for Washtenaw County representing plaintiff, Catherine McClary. And I'd just like to introduce, for the record, the Washtenaw County Treasurer, Catherine McClary.

THE COURT: Good afternoon.

MR. GRAVELYN: Good afternoon, your Honor, Dan Gravelyn representing defendant, Title Office.

THE COURT: You may proceed.

MR. GRAVELYN: Thank you. Your Honor, we have filed a motion for summary disposition on two distinct grounds. One, we've designated as a standing objection, the other goes to the merits of the dispute. I'm only going to speak briefly to the standing issue because standing may be a bit of a misnomer in this context. We're not contending that the County Treasurer does not have a stake in the outcome of this suit. It's quite evident that she does. Rather, what we're contending is that the Michigan Freedom of Information Act authorizes only the party making a Freedom of Information Act

request to initiate a legal action. And since the Freedom of Information Act is providing the rule of decision in this case we contend that the treasurer is not permitted to file a preemptive strike on the declaratory judgment action which will have the net effect of depriving the requesting party of the procedural advantages that exist for a requesting party under FOIA.

When a party makes a request under FOIA and they don't receive what they want from the public body, the statute gives them three options. They can let the matter drop, they can appeal it to the chief officer of the public body, or they can file a lawsuit in circuit court. And FOIA gives the party that's filing a lawsuit the option of choosing whether to file that suit in the county where the records are located or whether to file that suit in the county where the requesting party is located. That's a decision that FOIA gives to the party making the request.

In this case, by availing herself of the declaratory judgment act the county treasurer has deprived the Title Office of it's choice of venue in this case. And we think, for a very evident reason, the treasurer is well aware of the fact that Ottawa County, where the Title Office is located and where it would have filed suit in this case, has already ruled on the issue of this before, your Honor, and has ruled in favor of the Title Office. So, we submit that in launching

this preemptive strike, the treasurer is not only depriving us of our procedural advantages under FOIA, but she's also engaging in a bit of forum shopping. So we would ask, your Honor, to dismiss her action on the grounds that she is not a proper party to initiate a lawsuit under FOIA.

Shall I address the second part of the motion, as well?

THE COURT: Sure.

MR. GRAVELYN: The merits of the case present an issue of what the proper fee is for property and property tax records requested from a county treasurer under FOIA. The Title Office submitted a request to the Washtenaw County Treasurer seeking a copy of a computer tape, or computer files that contain the property tax information on every parcel of property located in this county for 1996 through 1999. These are records that the county treasurer is required by law to keep. They're records that she has to keep in order to identify who owns property, what the property taxes are and whether they have been paid. And we have submitted a request for a computer file containing those records.

The Title Office contends that the proper fee is provided by FOIA and that fee is the actual incremental cost of making a copy of that public record. I think the parties don't dispute, your Honor, that that would be a couple hundred dollars in this case. The treasurer has contended that she is entitled, under the title and abstract statute, MCL 48.101, to

charge the title office twenty-five cents per parcel, per year, for each parcel of property reflected on this computer tape. And, your Honor, that would be, conservatively, over $100,000.

Now, as the county treasurer has put in her affidavit, that twenty-five cents per parcel, per year, for delinquent properties would total fifty-five hundred dollars, but we've requested information on all parcels. And delinquent parcels make up a very small fraction of all the parcels. And I mention this, your Honor, just to underscore the fact that what's at stake here is not simply dollars, but access to these records. Because if the treasurer is entitled to rely on the title and abstract statute the cost of obtaining these records becomes prohibitive.

The legal issue before Your Honor is whether the incremental cost provisions of FOIA apply or whether the title and abstract statute provides the fee. We made our request under FOIA and FOIA defines a public record as, "any writing possessed by a public body", that's in section 2E of FOIA. FOIA goes on to define writing to include computer data, computer tapes and the like. The fee that a public party can charge for a copy of a public record is set forth in section 4 of the statute. And that section says that a public body must charge the actual incremental cost of duplicating the public record unless it fits within a narrow exception. That

exception is this, "a public body may charge a different fee if the fee for providing a copy of the public record is specifically provided by another statute" and we cited, too, your Honor, the Redner (sp) case in which the Court of Appeals has made it very clear that it interprets the words "specific" to mean explicit. The other statute must explicitly provide a different fee for the public record that's been requested.

Your Honor, we submit that the Court should engage in a two step analysis here. First, ask what public record has been requested. Second, ask does MCL 48.101 explicitly provide a fee for a copy of this public record.

Now, the public record that's been requested here, as I've indicated, is a computer tape. And we've cited a number of cases in our brief, and so has the other side, on what it means to -- difference between a public record and public information. The Michigan Freedom of Information Act does not entitle people to request from the government public information. They can only -- it only entitles them to request a public record. So until information is placed in some medium the public has no right to it. In fact, FOIA makes it clear in the statute, in section 3 that FOIA does not require a public body to make a public record. It only requires them to provide a copy if a copy exists.

The Farrell (sp) court, your Honor, has made it quite clear that the public body must produce the record that's

requested. In that case the Detroit Free Press requested a copy of a computer tape containing property tax information. And the city offered instead a print-out, paper record, of that information. The Court of Appeals said that's not good enough. The public record that was requested was the computer tape. The computer tape is what must be produced.

The second question, your Honor, is whether or not MCL 48.101 explicitly sets a different fee for the computer tape that was requested by The Title Office here. And I think it's obvious from reviewing the statute that it does not. 48.101 refers to a situation where the treasurer is given a request by someone for property tax information. Makes a search through those records, produces a paper transcript that abstracts or summarizes the property tax information and provides that to the person making the request. And the statute says for that service, for providing that document that summarizes our record, a portion of our record, we're entitled -- the treasurer is entitled to charge twenty-five cents per parcel.

We have requested not a transcript, but a computer tape. And the treasurer's office has responded by trying to convince the Court through dictionary definition that a transcript includes a computer tape. But it doesn't. The definition of transcript in the dictionary they've cited to Your Honor, which is the American Heritage Dictionary New College Edition

defines a transcript as, "something transcribed, a written, type-written or printed copy." That's the definition. It then defines transcribed, the first definition if offers is, "to write or type a copy of, to write out fully as in shorthand." That is what MCL 48.101 refers to. That is not what we've requested.

In fact, your Honor, computer tapes, computer information didn't exist when MCL 48.101 was written. So I think it's somewhat disingenuous to suggest that it explicitly covers computer records when they're requested under FOIA. And I would submit to Your Honor that the interpretation of the statute that the county is urging here turns that statute on it's head. MCL 48.101 was never intended to provide a profit center for county treasurers. It was entitled to reimburse them for their cost of providing a service. And that is evident if Your Honor looks at subsection 5 of that statute which is a recent amendment by the Michigan Legislature which states that in Wayne County they can charge a different fee to incorporate a different cost formula. But in no event can they make a profit on the -- on providing copies of those records. It's a cost of service statute. Here the fee that the treasurer is urging is far more than the cost of duplicating the records by exponential factor.

I think further, your Honor, if you look at all the statutes that have been cited by the parties through the

briefs in this case you will see an overriding public policy. In FOIA, in the Michigan Election Law, in the voter -- in the voter election -- in the voter records, in the Michigan Vehicle records, an overriding public policy, that public agencies must provide records at their cost. And that's what we're urging here.

In closing, your Honor, I'll briefly address one or two of the arguments that appear in their brief. One is they argue that because The Title Office wants this information to advance a commercial purpose that Your Honor should give them less deference in strictly construing the FOIA Act. I would submit to Your Honor that many persons, perhaps most of the people who make a request under FOIA, are doing so in advancing a commercial purpose. The Detroit Free Press in making FOIA requests is advancing a commercial purpose. So is Westlaw and Lexus and so are we. There's nothing wrong with that.

In fact, FOIA contemplates it. It states in section 4 that the fee shall not vary depending upon the identity of th person making the request. It also provides that the public body can waive the fee entirely if the purpose of the information will primarily benefit the general public. We're not asking for that waiver here, we're simply asking Your Honor to enforce FOIA as it's written and to hold the treasurer to charging the incremental cost of making the co

In sum, your Honor, we ask this Court to follow the decisions of the Circuit Court in Ottawa County and the Circuit Court in Oakland County and grant our motion for summary disposition. Thank you.

MR. HEDGER: Thank you, your Honor. I, too, will just briefly touch on the standing issue, or what the defendant has called the standing issue. Essentially what the defendant is arguing on this issue is that the treasurer is somehow using the declaratory judgment statute, or the court rule under 2.605, to avoid a FOIA action. And that's not true at all. What's happening here is that there's a legitimate dispute that's actually, literally, statewide on this fee issue. It ranges, as counsel indicates, from Ottawa County on the west to Oakland County over in our neck of the woods and that has not been resolved by any reported decisions by the Court of Appeals. So the only standard that the treasurer has to meet to bring a legitimate declaratory judgment action is to prove that she's an interested party and that there's a case or controversy.

Well, as a constitutional elected officer, she's sworn to upheld all the laws of the State, including FOIA and 48.101. And I don't think anyone's going to dispute that there's a legitimate dispute here, no pun intended. So, not only is the treasurer an interested party, she's the interested party in this county on this particular issue. And for the reasons I

just gave there's clearly a case or controversy on this because we don't have any appellate decision. And I might note just for the record, that what's happened is The Title Office has been successful on two circuit court actions in Oakland County and also in Ottawa County and has attempted to parlay those non-binding decisions, which I'll get into in a minute, really don't address our arguments here, into strong-arming the rest of the counties into following that decision. And that's really -- we're in a reactive position, not a pro-active position.

So, I think it's pretty clear that the treasurer clearly has standing to bring this action. One other quick comment on that. I think what they argued in their brief was if a governmental entity, or a constitutional officer is allowed to bring a dec action every time there's a FOIA request it's going to gut FOIA. Well, certainly this Court has the right to determine what's a legitimate declaratory judgment action and what is just a ruse to try to avoid FOIA.

It's a little offensive, frankly, because I've been here nine years and our philosophy has been to routinely grant FOI requests. This is the first time in nine years that I've eve had anything similar to this and it's because we have an unusual situation. So, from our perspective the treasurer clearly has standing to bring this declaratory judgment action. And even the two circuit court cases that counsel

refers to agreed with us on that position.

Now, as far as the actual meat of the argument goes, I'd just like to point out one thing from the get-go. At the time that the request was made in March, the treasurer didn't have the 1998 winter tax bill. So she didn't have the requested information for all the parcels. That why we addressed the delinquent tax parcel issue, which is a much smaller issue. But lets get into the meat of this argument.

There are, I think both sides agree, there are two exceptions under FOIA, to the FOIA fee provisions. The first basically states that if another statute specifically provides for the sale of the public record, but the second one states if another statute specifically provides a fee to release the information. Now, MCLA 48.101 specifically mandates what a county treasurer shall, and the word shall is used in the statute, charge to release certain delinquent tax information. It's just there. I mean, the treasurer has no choice on the matter. The defendant argues that 48.101 doesn't apply because we didn't ask for a transcript, we didn't ask for an abstract, we asked for a computer tape. But the key distinction that the Court needs to recognize is that whether it's computerized documents or whether it's a written transcript or abstract, the information is identical. It is the same information.

What appears to be happening is that The Title Office is

using computerization as an end run around the fees. They've never denied that the information requested to be downloaded on a computer tape is identical to the information produced by a transcript or abstract.

Basically, your Honor, I'd like to get into the case law just quickly. They cite the three cases and then, of course, the two circuit court decisions. And if you look at these five cases closely they do not support granting summary disposition in their favor in this case. For example, Grabner (sp) versus Clinton Township, which was a '96 Michigan Court of Appeals case, focused exclusively on the first exception to FOIA. It never got into the second exception of FOIA. The same with the Detroit Free Press case, which, by the way, is a non-published decision, is not binding on us anyway. But even if it were, again, they're dealing with whether another statute specifically authorizes the sale of information.

The treasurer doesn't deny that 48.101 doesn't specifically authorize the sale of the information. We're relying on the second exemption under the FOIA fee statute. Farrell (sp) has even less instruction for us in this case. Because all Farrell holds is that if a person makes a request under FOIA for computerized information then the governmental entity has to get it up in a computerized format. We've never denied that. The treasurer stands ready, willing and able to download all this information on a computer disk, provided

they pay the statutory fee and don't try to avoid it.

So that really doesn't help us either. Now, as far as the two circuit court cases go. Judge Gilbert's decision, again, focuses exclusively on whether the other statute authorizes the sale, and so does Judge Post (sp). They both look at the first exemption. They don't focus on the second one. Now, I think the key to this case, your Honor, and it really is a statutory interpretation case, but I think the key to this case is found in the Records Media Act in the Reproduction of Public Records Act. What the Reproduction of Public Records Act says essentially, is that a governmental entity has the right to copy any public record in any format recognized by the Records Media Act.

The Records Media Act in turn allows governmental entities to computerize their records. That's what's happened here. The treasurer has got computerized copies of her records. Now, the key language is 691.1103. What it says here, your Honor, is , "A reproduction of a record in a medium pursuant to the Records Media Act has the --" and this is quote, "-- has the same force and effect of the original." That, to me, that's saying that a computerized record is the functional equivalent of a paper document. Now it goes on to say that a computerized document can be treated as an original for the purpose of admissibility in evidence.

I mean, clearly the legislature is looking at this act

and saying, look, this was a 1992 act, or it was recently amended in '92, we recognize that everyone is moving into the 21st century, computerizing documents, including governmental entities, it's going to have the same force and effect as the original. So then the question arises, if it has the same force and effect as the original, wouldn't 48.101 apply? It - - basically is a computerized transcript, is what they're asking for for every delinquent tax parcel in the county.

What defendant has attempted to do is to try to distinguish paper records from computerized records and really it comes down to hair-splitting and, again, I don't mean to put words in their mouths, but it seems that the only rationale that they have is to avoid paying the fee. And I can't blame them for that, they are a for-profit corporation, but still the law must be followed.

If this Court is going to accept the position that's been put forward by The Title Office and has been, in my opinion, erroneously accepted in two circuit courts, then any statutory fee structure is going to be invalidated. Because it wouldn't matter if it was the clerk with the assumed names or any other governmental entity that's permitted to charge a fee, there'd be nothing to stop an individual or a company from coming in and saying I want a computerized copy of those -- of that information, therefore your fee structure doesn't apply, sorry. You have to do it at the FOIA rate. And this isn't a

case where we're trying hold back information under FOIA, we're more than willing to give the information up. We know that. It's just a question of the fee.

Now, one thing I do have to touch on briefly is that they made the argument that we're going to make a windfall off this. That this is going to be a boon for us. The affidavit from Ms. McClary indicates clearly that her office spends hundreds of thousands of dollars a year just to maintain these records in computerized version. For the amount it would cost them to get the comput -- the delinquent computerized tax information, it wouldn't come near even off-setting this. And not to suggest that we should charge that much. I mean, that clearly is not the intent either. But at some point the legislature in enacting 48.101 saw fit to say that that particular piece of information, i.e. delinquent tax information, is worth twenty-five cents a parcel. And, again, I can't stress highly enough and strongly enough that whether you put that in a computerized format or you come in off the street and say I want to have 10,000 papers that have delinquent tax information, it's twenty-five cents. It's the same information.

With the computerization in her office, it's not like the olden days, as they suggest, where if a person came off the street they would have to say, well, I want the delinquent ta information for these five parcels and then a person has to g

and copy stuff down. It's all on computer anyway. They just hit a stroke of a button and it gets downloaded. So whether you're going to do the paper or not, the rationale for the twenty-five cent per parcel's the same. And what they're asking you, your Honor, is basically to allow them, at a much reduced cost, to basically create a computerized version of 10,000 of their own transcripts because there's nothing to stop them from taking the computer tape and then going back to their office and pushing the same button we would have pushed and getting the 10,000 papers.

So, it does seem fundamentally unfair to us, your Honor, you know, if I come in as an individual and I want 100 tax parcels I gotta pay whatever it is, $25. or $2.50, they're going to get the same information, really on a per parcel basis for an incredibly lower price simply because they're trying to find a loophole through the statutes.

Let me just wrap this up quickly here. It's an interesting case, I could go on for a long time, but I know we have other things to get to here. Basically what this case involves, and the reason we brought it as a dec action is that in our mind it clearly involves a case of statutory interpretation. You've got more than one statute that arguably applies to whether these fees apply under FOIA or under 48.101. That's why we need your help because we don't have any appellate decision yet because The Title Office chose

to keep going ahead with their FOIA requests before the appellate courts resolved the original issue.

That's why we brought it to you. As we pointed out, one of the general rules of statutory interpretation is that if one or more of the statutes deal with the same issue, you should make -- you must make an effort to harmonize those two statutes. What the defendant is suggesting is we're going to harmonize the two statutes by just ignoring one of them. That makes it easy, you can just ignore 48.101 and you're left with FOIA.

But what we've done and what we've suggested in our brief is legitimate attempt to harmonize these two statutes. For example, we don't deny that we have to give this information up under FOIA, in a computerized format, but because a different statute sets a fee for the information we think it's only fair that the other side recognize that fact and pay the costs. So, in our mind that harmonizes those two statutes. If you accept their position, 48.101 is basically gone. And the other statutory fee provisions will be gone as well because you can just ask for them in a computerized format.

In any event we would ask this Court to declare that the fee structure of 48.101 does apply to the request and should be enforced. Thank you.

THE COURT: Anything briefly in rebuttal?

MR. GRAVELYN: Yes, your Honor, very briefly. Why

shouldn't the fee be different for someone who walks in and asks the treasurer to go to the record and make a transcript of it than it would be for someone who goes in and asks for a copy of the computer tape? The cost to the treasurer producing those different records is different. And both 48.101 and the Freedom of Information Act -- a public policy of producing duplicates of public records at cost. Your Honor, we submit that their position has ignored the language of FOIA. They're asking Your Honor to give a rather strange and unextraordinary meanings to the words transcript and abstract in 48.101 and it's our position that best harmonizes the two statutes. Thank you.

THE COURT: Thank you. Defendant argues that plaintiff does not have standing. The Court does not agree. In the Oakland case defendant relies on, Judge Gilbert did not find an issue of standing. In the Ingham County case relied on by defendant, which is the case brought by defendant, Judge Post opined that, quote,

> "The treasurer finds himself in a difficult position because there is a request made for a record and he faces a statute which requires him to charge a fee. If he fails to do so he could have to answer to the taxpayers and if he does so erroneously he has to answer to the person seeking the information. So the matter is properly before the Court."

Unquote. Therefore, in both cases the defendant relies on the courts ruled directly or indirectly that the case was properly before the court.

Further, under 2.605 an interested party may seek a declaratory judgment provided an actual case or controversy exists. The plaintiff's dilemma posed in this case, as Judge Post aptly points out, makes it appropriate for the court to render an opinion on the issue. In addition the court rule provides that the court may declare the rights and other legal relations of an interested party, quote, "whether or not other relief is or could be sought or granted." Unquote. Therefore, whether or not the FOIA provides declaratory relief for the governmental body served with the request, under the court rule the entity is allowed to seek a declaratory ruling in cases where an actual controversy exists.

There is no dispute that an actual case or controversy exists here. Therefore, the Court finds the plaintiff has standing to pursue this issue.

As to the merits, clearly the section of the FOIA at issue here provides two exceptions to the application of the Freedom of Information rate. MCL 15.2344 provides, quote,

> "this section does not apply to records prepared under an act or statute specifically authorizing the sale of those public records to the public or where the amount of the fee for providing a copy of the public record is

otherwise specifically provided."

Although MCLA 48.101 does not explicitly mention sales of tax delinquency information it does explicitly provide a rate charge for providing the records. The plain language of the statute makes it mandatory for the treasurer to charge the rate specified. In addition, as plaintiff argues, MCLA 691.1103 the Reproduction of Public Records Act states that,

"A reproduction of a record consisting of a print-out or other output, readable by sight, prepared under any other law has the same force and effect as the original."

Unquote. The enhanced access to public records, MCLA 15.441 at seq. also provides that the governing body can charge a reasonable fee to provide a public record as defined under FOIA. Calculated to cover the operating expenses of producing the record by enhanced access by digital means. Rules of statutory construction require that statutes be read in harmony. However, where there is a conflict the more specific statute, the Abstracts Act will prevail over the general one, the Freedom of Information Act.

Defendant has provided an unpublished Court of Appeals case which relies on the Grebner (sp) case to conclude that, quote,

"This is not the explicit authorization contemplated by the FOIA in order to render inapplicable its cost

provisions."

Unquote. The court reached that conclusion while conceding that the Motor Vehicle Act at issue, quote,

"Explicitly authorizes the sale of motor vehicle registration lists and other information from the motor vehicle records."

Unquote. And further provides that the Secretary of State can set a, quote, "reasonable price or charge", unquote, for the information. The obvious conclusion to be drawn from these opinions is that courts do not favor avoidance of the application of the fee provisions of FOIA. However, the legislature could have easily provided that the FOIA rate take precedence over other rate provision statutes. Instead, via section 4, the legislature explicitly provided two exceptions to the application of the FOIA rate provisions.

Therefore, the Court respectfully disagrees with the two circuit judges' interpretation of the plain language of the statutes. This case clearly falls under the second exception or where the amount of the fee or providing a copy of the public record is otherwise specifically provided. Plaintiff states and defendant does not dispute the fact that defendant has been paying the statutory rate under the Transcripts and Abstracts Act prior to and during this lawsuit.

The Court acknowledges that the Court of Appeals has expressed a different interpretation in an unpublished

opinion, Detroit Free Press versus Michigan Department of State. Further, the Court has been informed that the Oakland County Circuit decision, which involves facts and circumstances identical in this case, is before the Court of Appeals. Because that case may provide guidance in this case the Court finds it appropriate at this time to maintain the status quo between the parties to this case pending an appellate decision in the Oakland County case.

The cross motions are denied without prejudice. The case is stayed and the status quo maintained between the parties until such time as the Court can consider the application of the opinion of the Court of Appeals in an identical case now pending before the court.

MR. HEDGER: Thank you, your Honor.

MR. GRAVELYN: Thank you.

(Proceedings concluded at 2:23 p.m.)

* * * * *

STATE OF MICHIGAN)
)
COUNTY OF WASHTENAW)

I certify that this transcript, consisting of 25 pages, is a complete, true and correct transcript to the best of my ability of the videotaped proceedings taken in this case on 9/29/99.

October 10, 1999

Sandra Castle (CER 4674)
Certified Electronic Recorder
101 E. Huron St.
Ann Arbor, MI 48107-8650
(734) 994-2554

EXHIBIT D

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

CATHERINE McCLARY,
WASHTENAW COUNTY TREASURER,

Plaintiff,

vs.

Case No. 99-10618-CZ

THE TITLE OFFICE, INC., a Michigan Corporation,

Honorable David S. Swartz

Defendant.

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OPINION AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY DISPOSITION AND DENYING PLAINTIFF'S MOTION FOR SUMMARY DISPOSITION

At a Session of the Court held in the
Washtenaw County Courthouse
City of Ann Arbor, on May 14, 2001.

PRESENT: HONORABLE DAVID S. SWARTZ, CIRCUIT JUDGE

On September 9, 2000, this Court issued an opinion denying the parties' cross-motions for summary disposition, without prejudice. While the Court indicated its inclination to rule in favor of Plaintiff, the decision was held in abeyance until such time as the Court of Appeals

rendered its decision in a pending case involving the same issue. On May 3, 2001, the Court was notified that a decision had been rendered in that case on April 3, 2001.

As in this case, the issue before the Court of Appeals was whether Defendant should be charged under the nominal fee provisions of the Freedom of Information Act (FOIA) or under the more substantial fee provisions of MCL 48.101(1)(a) and (d) to obtain electronic copies of property tax information. The Court determined that while the language of MCL 48.101 requires specific fees to be paid for the preparation of tax certificates, abstracts or transcripts, it does not explicitly provide that the same fees must be paid for the production of electronic copies of tax information. Thus, the electronic copies of delinquent tax records requested by Defendant must be provided using the FOIA nominal fee requirements. *Oakland County Treasurer v. The Title Office, Inc.*, No. 216846, April 3, 2001. Because the facts and issues are identical, the holding in *Oakland County* controls the disposition of the instant case.

Accordingly, Plaintiff's motion is DENIED, and Defendant's motion is GRANTED.

IT IS SO ORDERED.

PROOF OF SERVICE
The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleadings on 5-15-2001
By: ___ U.S. Mail ___ Express Mail
___ Hand Delivered ___ Fax ___ Other Office
Signature

David S. Swartz,
Circuit Judge

EXHIBIT E

H
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Delaware, New Castle County.

RONALD G. CONNOLLY, M.D., P.A., et al.,
v.
RUSSELL J. LABOWITZ, M.D., P.A., et al.

Dec. 15, 1987.

Upon defendant's application for assessment of costs. Granted in Part.

James S. Green, and Collins J. Seitz, of Connolly, Bove, Lodge & Hutz of Wilmington for plaintiff.

Edmund N. Carpenter, II, and John A. Parkins, Jr., of Richards, Layton & Finger, Wilmington, for defendant.

ORDER

POPPITI, Judge.

***1** This 15 day of December, 1987, it appears that the matter is presently before the Court on the parties' respective application for the assessment of costs.

I. Expert Witness Fees

The award of expert witness fees is governed by the provisions of 10 *Del.C.* Section 8906 which provides in pertinent part as follows:

The fees for witnesses testifying as experts or in the capacity of professional [persons] in cases in the Superior Court, ... shall be fixed by the court in its discretion, and such fees so fixed shall be taxed as part of the costs in each case and shall be collected and paid as other witness fees are now collected and paid.

It is well settled under the developed case law that it is within the discretion of the court to assess as costs expert witness fees for the time necessarily spent in actual attendance upon the court for the purpose of testifying. *9.88 Acres of Land v. State,* Del.Supr., 274 A.2d 139 (1971). It is also well settled that attendance includes a reasonable time for traveling to and from the courthouse, waiting to testify and actually testifying. *Stevenson v. Henning,* Del.Supr., 268 A.2d 872 (1970).

Having stated the above the following fees are awarded as costs in favor of the defendant:

Dr. Jonas R. Rappeport	
Travel To and From Court	$ 102.15
Time awaiting to and actually testifying	5,000.00
Meals and Lodging	129.84
Total	$5,231.99

The costs incurred by Doctor James S. Olsson have already been paid by the plaintiff's and therefore need not be assessed.

No fees are awarded for the costs associated with the examination of the plaintiff conducted by Drs. Rappeport and Olsson which I have heretofore ruled would be borne by the defendants. *Connolly v. Labowitz,* C.A. No. 83C-AU-1, slip op. at 7 (Del.Super., Feb. 18, 1987). I am satisfied that the provisions of 10 *Del.C.* Section 8906 do not provide for the court to award the costs of services provided in advance of time expended in conjunction with actually attending the trial for the purpose of testifying. Compare *9.88 Acres of Land,* supra. and *0.0673 Acres of Land,* Del.Supr., 224 A.2d 598 (1966).

No fees are awarded as costs for either Lawrance Weiss, M.D. or Robert Saddoff, M.D. since they did not testify at trial.

No fees are awarded as costs for David Raskin, M.D. since Dr. Raskin testified as afact witness and not as an expert witness.

II. Deposition transcripts

Superior Court Civil Rule 55(f) provides in pertinent part as follows:

The fees paid court reporters for the Court's copy of transcripts of depositions shall not be taxable costs unless introduced into evidence. Fees for other copies of such transcripts shall not be taxable costs.

Consistent with the clear language of the rule the following transcript expenses are awarded as costs in favor of the defendant as follows:

Deposition transcripts of Phyllis Marenco. (Court's copy)	$157.50
Video Deposition and Transcript of Leonard Lang, M.D. (Court's copy).	326.88

[FN*]

Total Deposition Costs	$484.38

*2 While portions of other depositions may have been used to test the credibility of a particular witness or to refresh recollection, no other depositions were introduced into evidence. The requested costs for the court's copy of all other deposition transcripts are, therefore, HEREBY DENIED.

III. Daily Trial Transcripts

Superior Court Civil Rule 54(d) provides as follows:

Except when express provision therefor is made either in a statute or in these Rules, or in the Rules of the Supreme Court, costs shall be allowed as of course to the prevailing party unless the Court otherwise directs.

I am aware of no express provision in any statute or rule of Court which expressly precludes the Court from awarding the expense of the Court's daily copy of trial transcripts as costs of the case. Further, I am mindful that in the case of *Walsh v. Hotel Corp. of America,* Del.Supr., 231 A.2d 458 (1967), the Supreme Court stated that Delaware Courts "are very cautious in approving exceptions" to the general rule of approving the award of costs to the prevailing party.

The question then becomes are the expenses of daily transcripts costs of the case. I conclude that they are not.

Generally court costs can be described as those expenses which are routinely and necessarily incurred in order to process a case through the judicial system. Such costs certainly include such things as filing fees, prothonotary docketing fees and statutory fees such as expert witness fees, 10 *Del.C.* Section 8406, and juror fees, 10 *Del.C.* Section 4511.

The expense of daily transcripts is, in my view, an expense that is not absolutely necessary to process the case through the system, rather it is an expense incurred for the professional convienence of counsel for the respective parties. While daily transcripts are extremely helpful to both counsel and the court, there was no requirement that daily transcripts be ordered in this matter.

Having stated the above, I conclude that the application for the assessment of the costs of the preparation of the court's copy of daily transcripts is HEREBY DENIED.

COSTS OF SPECIAL JURY

When this case was marked for trial by a special jury it was pursuant to the provisions of 10 *Del.C.* Section 4541 et. seq. As these provisions relate to the expenses of a special jury, 10 *Del.C.* Section 4543 provides in pertinent part as follows:

"The party applying for a special jury shall pay the expenses occasioned by the trial of the cause by such special jury, and the same shall not be allowed to him as part of the costs in the case, unless the Court shall, immediately after the trial of the cause, certify upon the record that the cause was proper to be tried by a special jury."

Under this statutory scheme, upon application by a party that a matter be tried by a special jury the court must grant the application and the only matter left to the proper discretion of the court is the authority granted to award the costs of the special jury after trial. *Nance v. Rees,* Del.Supr., 161 A.2d 795 (1960).

*3 The question becomes is this case a tort action of sufficient complexity to warrant taking it from the ordinary jury panel? In *Nance v. Rees, supra,* the Supreme Court articulated some guidance in this regard:

Since the matter of taxing the costs lies in the discretion of the trial court, it is obvious that there must be some reason to impel the court to exercise its discretion in that respect. We can think of no reason for so doing except that the particular cause is of such complexity as to make desirable the striking of a special jury which, presumably, would be better able to deal with complex issues of fact. As a practical matter, we would suppose that only in suits involving breach of contract with elaborate

proof of complex factual situations would the court's discretion be moved to award the costs to the winning party.

I am satisfied that the Supreme Court has interpreted the concept of complex case to mean more than just a case that takes a longer time to present the evidence than a more routine civil trial of from 3 to 5 days.

While this case took some 22 trial days, I am not satisfied that the testimony which involved a great deal of medical testimony was sufficiently complex, that is complicated or highly technical in nature, so as to warrant the taking of this case away from a general jury panel.

Having stated the above the application to assess the cost of the special jury panel is HEREBY DENIED.

The above specified costs result, therefore, in a total cost-assessment against the plaintiff in the amount of $5,716.37 which cost shall be paid forthwith.

Having previously ruled that the defendant was the prevailing party in this litigation plaintiff's motion for costs is HEREBY DENIED.

> FN* I am satisfied that in the age of video tape, transcripts should be held to encompass a "video transcription". Indeed, Black's Law Dictionary, 5th ed., 1979, **defines transcript** as:
> That which has been transcribed. A **copy** of any kind, though commonly the term refers to a **copy** of the record of a trial, hearing or other proceeding ...

1987 WL 28316 (Del.Super.)

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